No.

In the

Supreme Court of the United States

Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly,

Petitioners,

v.

Emory E. Gibson, Jr.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The delayed-accrual rule of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), delays the accrual of a claim under *42 U.S.C. § 1983* which, if successful, would necessarily imply the invalidity of the *§ 1983* plaintiff's conviction or sentence until the plaintiff's conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas.

1. Is a *§ 1983* plaintiff's claim that the police conducted an unlawful search in violation of the Fourth Amendment subject to the delayed-accrual rule of *Heck v. Humphrey* because the search uncovered evidence used to convict the plaintiff at his or her criminal trial?

2. Is a *§ 1983* plaintiff's claim that the police selectively enforced the laws against the plaintiff in violation of the Equal Protection Clause subject to the delayed-accrual rule of *Heck v. Humphrey* because the enforcement led to the discovery of evidence used to convict the plaintiff at his or her criminal trial?

LIST OF PARTIES

The petitioners are Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly. Respondent is Emory E. Gibson, Jr.

The Superintendent of New Jersey Department of Law and Public Safety-Division of State Police, the New Jersey Turnpike Authority, and the Treasurer of the State of New Jersey, like petitioners, were appellees in the court below but are not petitioners in this action.

John Does 1-10 were named as defendants in the district court and were named as appellees in the court below, but the plaintiff (respondent Gibson) did not identity or serve them.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, 1a-44a) is reported at 411 F.3d 427 (3rd Cir. 2005). The opinion of the district court (App., *infra*, 47a-79a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on June 14, 2005. (App., *infra*, 45a-46a). A timely petition for panel rehearing or in the alternative for rehearing en banc was denied on August 17, 2005. (App., *infra*, 80a-81a). On November 4, 2005, Justice Souter entered an order extending to December 15, 2005, the time within which petitioners were permitted to file this petition. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254(1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The full text of this constitutional amendment is reproduced at App., *infra*, 82a.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The

full text of this section of this constitutional amendment is reproduced at App., *infra*, 83a.

The relevant portion of *42 U.S.C. § 1983* provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." The full text of this statute is reproduced at App., *infra*, 84a.

STATEMENT OF THE CASE

Circuit courts, like the majority and dissenting opinions of the United States Court of Appeals for the Third Circuit in the decision below, are divided on the issue of how to apply the delayed-accrual rule of *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), to a *§ 1983* plaintiff's claim which, if successful, would not automatically imply the invalidity of the plaintiff's conviction or sentence, but would imply the illegality and consequent taint of evidence used to convict the plaintiff at his or her criminal trial. This issue arises in several contexts. The issue arises most often in the Fourth Amendment context when a *§ 1983* plaintiff claims that the police conducted an unlawful search that uncovered evidence that was not but should have been suppressed at the criminal trial. The issue also arises when a court concludes that a *§ 1983* plaintiff's claim that the police violated the Equal Protection Clause by enforcing the laws in a selective manner, if successful, would imply the illegality and taint of evidence that was not but should have been suppressed at the plaintiff's criminal trial because the unlawful selective enforcement led to its discovery.

In footnote seven of the *Heck* opinion, this Court provided guidance on this issue in its discussion of the application of the delayed-accrual rule to a *§ 1983* Fourth Amendment claim of unlawful search:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the *§ 1983* plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery and especially harmless error, such a *§ 1983* action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.
>
> [512 U.S. at 487 n. 7 (citations omitted)].

Circuit courts addressing the issue agree that footnote seven pertains not only to Fourth Amendment claims of unlawful seizure, but also to similar *§ 1983* claims that would, if successful, result in suppression of evidence at the criminal trial rather than outright dismissal of the criminal charges. The conflict dividing the courts and the majority and dissenting opinions below arises from differing interpretations of how footnote seven should be construed.

Some courts, and the dissenting opinion below, construe footnote seven to hold that accrual is never delayed solely because the alleged constitutional violation led to the discovery of evidence used to convict the plaintiff at his or her criminal trial. Other courts, and the majority opinion below, construe footnote seven to hold that whether accrual is delayed on this basis depends upon a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would serve to remedy the introduction of the allegedly tainted evidence at the plaintiff's criminal trial. In New Jersey, a variance between federal and state-court decisions means that plaintiffs may forum-shop to utilize the court, federal or state, that will allow their claims to proceed. Petitioners' contention that accrual is never delayed in these

circumstances is supported by policy and comity considerations and by recent statements of this Court affording footnote seven an expansive construction.

The first question presented raises this accrual issue in the Fourth Amendment context and asks whether accrual is delayed because a *§ 1983* plaintiff's claim of unlawful search, if successful, would imply the taint of evidence used to convict the plaintiff at his or her criminal trial. Petitioners' contention that accrual is never delayed solely on this basis is additionally supported by recent decisions of this Court suggesting that the delayed-accrual rule does not apply to claims like Fourth Amendment claims of unlawful search that are not cognizable in habeas corpus. The first question presented affords this Court the opportunity to clarify *Heck*'s footnote seven when it pertains to *§ 1983* claims that are not cognizable in habeas corpus.

The second question presented raises the accrual issue in the Equal Protection context and asks whether accrual is delayed because a *§ 1983* plaintiff's claim of selective enforcement, if successful, would imply the taint of evidence used to convict the plaintiff at his or her criminal trial. Persons found with drugs or other inculpatory evidence as the result of vehicular stops often invoke the Equal Protection Clause to seek outright dismissal of criminal charges or the lesser sanction of suppression of evidence derived from the vehicular stops which they claim to be tainted by discriminatory selective enforcement of traffic laws. This Court in *United States v. Armstrong*, 517 U.S. 456, 461 n. 2 (1996), left open as an unresolved issue "whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of [selective] prosecution on the basis of his race." *Id.*, at 461 n. 2. The second question presented includes the related subsidiary but simpler issue of whether any sanction greater than suppression is proper when discriminatory selective enforcement of the laws leads to the discovery of inculpatory evidence.

The decision of the Third Circuit below - that dismissal is the proper sanction - is at variance with the decisions of other courts and creates a conflict between the federal and state courts within New Jersey. The Supreme Court of New Jersey has held that suppression is the proper sanction. Petitioners argue herein that no sanction greater than suppression is proper, and application of *Heck*'s delayed-accrual rule to selective enforcement claims therefore hinges upon the appropriate construction of *Heck*'s footnote seven, albeit as applied to Equal Protection rather than Fourth Amendment claims.

Moreover, petitioners have not argued and do not argue that Equal Protection selective-enforcement claims are not cognizable in habeas corpus. The second question presented affords this Court the opportunity to resolve the circuit split in construing *Heck*'s footnote seven for *§ 1983* claims as to which the absence of habeas corpus relief cannot independently bar *Heck*'s delayed accrual.

A. Factual Background

Respondent Emory E. Gibson, Jr., is an African-American male. (App., *infra*, 3a). On October 28, 1992, petitioners Pennypacker and Reilly, both New Jersey State Troopers, stopped the vehicle in which Gibson was traveling as a passenger. (App., *infra*, 3a). A search of the vehicle uncovered a controlled dangerous substance which resulted in respondent Gibson's arrest, charge and conviction on a drug-related offense. (App., *infra*, 3a-4a).

According to respondent Gibson's complaint, petitioners Pennypacker and Reilly lacked reasonable suspicion to stop the vehicle and probable cause to conduct the search. (App., *infra*, 96a). Moreover, respondent Gibson alleged that the vehicular stop was the result of "racial profiling," that is, selective enforcement of the traffic laws against racial minorities premised upon petitioners' belief that minorities would more likely be in violation of drug laws and upon petitioners' racially discriminatory purpose to enforce the drug laws more

vigorously against minorities than against others. (App., *infra*, 88a-90a). Respondent Gibson's complaint did not allege that petitioners failed to bring drug charges against any similarly situated non-minority person in whose possession illegal drugs were found.

Respondent Gibson was sentenced to fifty years in prison. (App., *infra*, 4a). Ten years after the vehicular stop, and eight years after he was sentenced to prison, the Superior Court of New Jersey vacated respondent Gibson's conviction and dismissed the indictment against him. (App., *infra*, 111a-112a). The State of New Jersey moved for this relief in respondent Gibson's case and in 85 other cases because it could be argued, and a conclusion could be reached by the criminal court, that colorable issues of racial profiling were present in the vehicular stops. (App., *infra*, 34a, 109a-110a).

Within a two-year period following the vacation of his conviction, respondent Gibson filed this action against petitioners pursuant *§ 1983* alleging *inter alia*: (1) that his Fourth Amendment rights were violated by the stop of the vehicle, search, and arrest without probable cause or reasonable suspicion; and (2) that, as a victim of racial profiling, he was subjected to racially selective law-enforcement practices violating his Equal Protection rights. (App., *infra*, 4a-6a). He also alleged derivative conspiracy claims pursuant to *§§ 1983* and *1985* based upon these allegations. (App., *infra*, 6a). Jurisdiction was predicated on 28 U.S.C. *§§ 1331* and *1343(1), (3)* and *(4)*. (App., *infra*, 85a).

B. District Court Proceedings

In the district court, petitioners moved pursuant to *Fed. R. Civ. P. 12(b)(6)* to dismiss respondent Gibson's complaint. (App., *infra*, 5a). Petitioners argued, *inter alia*, that respondent Gibson's Fourth Amendment unlawful search and seizure claims and his Fourteenth Amendment selective enforcement and conspiracy claims were barred by the statute of limitations. (App., *infra*, 5a). The district court granted the petitioners'

motion (and another motion not relevant to this petition filed by petitioners and other defendants claiming qualified immunity and other bases for relief) and dismissed the entire complaint with prejudice. (App., *infra*, 5a).

In dismissing respondent Gibson's Fourth Amendment claims as time-barred, the district court held that these claims accrued on the date of the vehicular stop and not on the date respondent Gibson's conviction was overturned. (App., *infra*, 64a). The court concluded that the Fourth Amendment claim, if successful, would result only in the suppression of evidence and thus did not invoke the delayed-accrual rule. (App., *infra*, 62a-64a). Further, while noting that circuit courts were split on the issue, the district court concluded that footnote seven of *Heck* did not require a fact-based inquiry to determine whether the accrual of the cause of action was delayed. (App., *infra*, 62a-63a, n. 5).

The district court also held that respondent Gibson's Fourteenth Amendment selective enforcement claim (and conspiracy claims) accrued on the date of the vehicular stop. (App., *infra*, 66a-67a). The court reasoned that these claims, if successful, would have warranted only the suppression of the seized evidence. (App., *infra*, 66a). The court concluded that because a successful judgment in a *§ 1983* claim for selective enforcement alone would have no effect on respondent Gibson's conviction or confinement, the accrual of his selective enforcement claims was not delayed. (App., *infra*, 66a-67a).

C. The Court of Appeals Decision

The Third Circuit affirmed the district court judgment except insofar as it dismissed the Fourth Amendment and Equal Protection claims and pendent state law claims. (App., *infra*, 32a). The court reversed the dismissal of the Fourth Amendment claims in a 2-1 opinion. (App., *infra*, 33a). The majority opinion held that in determining the application of *Heck* to a *§ 1983* Fourth Amendment claim which, if successful, would have required the suppression of evidence

seized, the district court must conduct a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would have remedied the introduction of the tainted evidence. (App., *infra*, 36a-38a). The majority opinion acknowledged the split in the circuits with respect to whether footnote seven of *Heck* requires this inquiry and allied itself with those circuits requiring it. (App., *infra*, 36a-38a). The majority opinion held that respondent Gibson's Fourth Amendment claims were subject to the delayed-accrual rule because Gibson's claims, if successful, would have required suppression of the drugs found at the time of his arrest, without which, in the court's view, the criminal conviction could not stand. (App., *infra*, 43a). As a result, Gibson's claims accrued not on the date of the vehicular stop but on the date his conviction was overturned, and his complaint, filed within two years of the accrual, was timely. (App., *infra*, 44a).

In dissent, Judge Van Antwerpen concluded that the majority misconstrued *Heck*'s footnote seven and that respondent Gibson's Fourth Amendment claims were not subject to delayed accrual. (App., *infra*, 10a-20a). Part of Judge Van Antwerpen's reasoning was that *Heck*'s delayed accrual does not apply to Fourth Amendment claims of unlawful search because this Court's opinion in *Stone v. Powell*, 428 U.S. 465 (1976), places these claims beyond the purview of habeas corpus. (App., *infra*, 16a-18a).

In a unanimous opinion, the court also reversed the dismissal of respondent Gibson's Fourteenth Amendment selective enforcement claim and his conspiracy claims derived from the allegation of selective enforcement. (App., *infra*, 32a). The court held that the sanction for selective enforcement as alleged in Gibson's complaint would have been outright dismissal of the criminal charges. (App., *infra*, 22a). On this reasoning the court held that, independent of *Heck*'s footnote seven, this claim was subject to delayed accrual and accrued on the date Gibson's conviction was overturned. (App., *infra*,

22a). His complaint, filed within two years of the accrual, was therefore timely. (App., *infra*, 22a).

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant the Writ to Resolve the Circuit Split and to Correct Confusion About *Heck*'s Footnote Seven.

The decision below adds to the substantial circuit conflict about a vitally important and frequently recurring issue of federal law that is raised in both of the questions presented: how to apply the *Heck* delayed-accrual rule to a *§ 1983* plaintiff's claim which, if successful, would not automatically imply the invalidity of the plaintiff's conviction or sentence, but would imply the illegality and taint of evidence used to convict the plaintiff at his or her criminal trial. The conflicting opinions, as well as approach taken by the decision below and other courts requiring a fact-based inquiry about the circumstances of the criminal trial (which sometimes occurs long after the alleged constitutional violation) create uncertainty about the date of accrual, which in turn creates uncertainty about the expiration of the statute of limitations. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). Because *42 U.S.C. § 1983* is a "most important, and ubiquitous, civil rights statute," the "conflict, confusion, and uncertainty" concerning the limitations issue "provide[s] compelling reasons for granting certiorari." *Id.*, at 266.

The conflict arises from differing interpretations of how Heck's footnote seven should be construed. Courts agree that footnote seven pertains not only to the Fourth Amendment claims of unlawful seizure that the footnote explicitly addressed, but also to similar claims that would, if successful,

result in the suppression of evidence at the criminal trial rather than outright dismissal of the criminal charges. *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1140-42 (9th Cir. 2005) (applying *Heck*'s footnote seven to due process and equal protection claims); *Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) (extending *Heck*'s footnote seven to civil claims based upon the federal wiretapping statute), *cert. denied*, 528 U.S. 908 (1999); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (extending footnote seven to Fifth Amendment claims challenging the voluntariness of a confession); *Patterson v. Burge*, 328 F. Supp. 2d 878, 896 (D. Ill. 2004) (same). The conflict arises in applying footnote seven to these claims.

The circuit decisions construing footnote seven fall into two groups. The First, Eighth, Tenth, and Eleventh Circuits hold that accrual is never delayed solely because the alleged constitutional violation led to the discovery of evidence used to convict the plaintiff at his or her criminal trial. *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) (holding that claims for false arrest and imprisonment under *§ 1983* accrue at the time of the arrest); *Whitmore v. Harrington*, 204 F.3d 784, 784-85 (8th Cir. 2000) (construing *Heck*'s footnote seven and holding that the claim that an investigative stop is unlawful accrues at the time of the stop); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (extending footnote seven to Fifth Amendment claims challenging the voluntariness of a confession and holding that a Fifth Amendment coerced-confession claim accrues at the time of the confession although the confession was used to convict the plaintiff); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558-59 & n. 4 (10th Cir. 1999) (disapproving of precedent from other circuits that construe footnote seven to require a fact-based analysis); *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (construing *Heck*'s footnote seven and holding that an unlawful search claim accrues at the time of the search).

On the other hand, the Second, Fourth, Fifth, Sixth, and Ninth Circuits hold that whether accrual is delayed depends

upon a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would serve to remedy the introduction of the allegedly tainted evidence. *Covington v. City of New York*, 171 F.3d 117, 121-24 (2d Cir. 1999) (applying *Heck* to a Fourth Amendment search and seizure claim); *Ballenger v. Owens*, 352 F.3d 842, 845-47 (4th Cir. 2003) (construing *Heck*'s footnote seven and applying *Heck* to a Fourth Amendment search and seizure claim); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (same); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 395-99 (6th Cir.) (noting the split of authority concerning the proper construction of *Heck*'s footnote seven and adopting the fact-based analysis), *cert. denied*, 528 U.S. 1021 (1999); *Harvey v. Waldron*, 210 F.3d 1008, 1015-16 (9th Cir. 2000) (same); *Huftile v. Miccio-Fonseca*, 410 F.3d 1136, 1140-42 (9th Cir. 2005) (extending *Heck*'s footnote seven to due process and equal protection claims and adhering to precedent requiring a fact-based analysis). The majority opinion below chose to ally itself with these circuits. (App., *infra*, 36a-38a).

The majority opinion below concluded that "the majority of Courts of Appeals have read footnote seven as requiring a fact-based inquiry" (App., *infra*, 37a) and that "the general trend among the Courts of Appeals has been to emp[illegible]y the fact-based approach." (App., *infra*, 38a). The majority opinion is wrong on both scores because it erred in its analysis of decisions of the Seventh, Eighth, Tenth and Eleventh Circuits. The Seventh Circuit has not categorically adopted either approach but has issued conflicting decisions that adopt both approaches, sometimes without distinguishing contrary precedent. Compare *Kramer v. Village of North Fond du Lac*, 384 F.3d 856, 862 (7th Cir. 2004) (construing *Heck*'s footnote seven to hold that the plaintiff's Fourth Amendment claim accrued at the time of the search although his conviction for commercial gambling rested largely upon gambling paraphernalia seized during the search) and *Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998) (construing *Heck*'s footnote seven to hold that Fourth Amendment claims for unlawful searches accrue at the time of the unlawful search,

rather than at the conclusion of any criminal proceeding) with *Gauger v. Hendle*, 349 F.3d 354, 360-62 (7th Cir. 2003) (delaying accrual of Fourth Amendment claim because evidence of the plaintiff's statements was the fruit of the alleged constitutional violation and the plaintiff could not have been convicted without this evidence). The Eighth, Tenth and Eleventh Circuits have not adopted the fact-based approach, and the decisions cited by the majority opinion below in support of its contention that they have (App., *infra*, 37a-38a) do not support this contention. The most recent decision of the Tenth Circuit is *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558-59 & n. 4 (10th Cir. 1999), which disapproved of precedent from other circuits that require a fact-based approach. Unpublished decisions of the Eighth and Eleventh Circuits issued after the decisions of these courts upon which the majority opinion below relied in support of its contention that these circuits have utilized the fact-based approach discredit that reliance by continuing to eschew the fact-based approach. *Parker v. Matthews*, 71 Fed. Appx. 613, 614, 2003 U.S. App. LEXIS 16913, at *3 (8th Cir. 2003) (unreported) (reaffirming prior Eighth Circuit precedent construing *Heck*'s footnote seven to eschew the fact-based approach); *Wallace v. Smith*, 145 Fed. Appx. 300, 301-02, 2005 U.S. App. LEXIS 16101, at *2-5 (11th Cir. 2005) (unreported) (reaffirming prior Eleventh Circuit precedent construing *Heck*'s footnote seven to eschew the fact-based approach).

The decision below creates a conflict between federal and state courts in New Jersey. In *Freeman v. State*, 347 N.J. Super. 11, 788 A.2d 867 (N.J. Super. Ct. App. Div.), *certif. denied*, 172 N.J. 178, 796 A.2d 895 (2002), the Appellate Division of the Superior Court of New Jersey held that the accrual of a *§ 1983* cause of action for an unlawful search is not delayed although evidence unlawfully derived from the search was integral to convicting the plaintiffs at their criminal trial. The Supreme Court of New Jersey has not addressed the issue, and *Freeman* is binding precedent in the trial courts of New Jersey. *Reinauer Realty Corp. v. Borough of Paramus*, 34 N.J. 406, 415, 169 A.2d 814, 891 (1961) (a trial judge is

"privileged to disagree with the pronouncements of appellate courts [but] the privilege does not extend to non-compliance"). The variance between federal and state-court decisions means that plaintiffs may forum-shop to utilize the court, federal or state, that will allow their claims to proceed.

The decision below negatively impacts upon federal-state comity interests by potentially requiring district courts to intrude into the files of state prosecutors and to review state-court records in order to determine whether doctrines such as independent source, inevitable discovery, or harmless error might have remedied the introduction of allegedly tainted evidence. The intrusion may be particularly acute if the criminal trial has not yet occurred. Most circuits courts have expanded the *Heck* delayed-accrual rule to encompass not only existing convictions, but also pending criminal charges, and to delay accrual of applicable causes of action until the charges are dismissed or resolved in favor of the *§ 1983* plaintiff. *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir.), *cert. denied*, 528 U.S. 946 (1999); *Smith v. Holtz*, 87 F.3d 108 (3d Cir.), *cert. den. sub nom. Wambaugh v. Smith*, 519 U.S. 1041 (1996); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 397-98 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998); *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 557 (10th Cir. 1999); *Uboh v. Reno*, 141 F.3d 1000, 1006-07 (11th Cir. 1998).

Thus, plaintiffs facing criminal charges in circuits requiring the fact-based inquiry might utilize the delayed-accrual rule as a discovery mechanism to learn facts about the evidence in the prosecutor's possession. Recognizing the difficulties of conducting the fact-based inquiry when it is applied to pending untried criminal charges, the Sixth Circuit has altogether foreclosed the inquiry in the case of untried charges and has held that accrual is automatically delayed at least until the criminal charges are resolved. *Shamaeizadeh*, *supra*, 182 F.3d at 398-99. This result simplifies the litigation

and serves the interests of federal-state comity but cannot be what this Court intended in *Heck*'s footnote seven even if a fact-based inquiry is proper.

On the other hand, the Fifth Circuit, unlike most circuits, has not explicitly expanded the *Heck* delayed-accrual rule to encompass pending criminal charges; but, having adopted the fact-based approach, the Firth Circuit recognizes that if the plaintiff is convicted in the forthcoming criminal trial, then the fact-based approach may retroactively delay the accrual of his or her pending Fourth Amendment claim of unlawful search. *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995). Because accrual will be "difficult to determine" until the criminal proceedings are complete, the Fifth Circuit has directed district courts to stay *§ 1983* proceedings "until the pending criminal case has run its course." *Ibid.* This result serves federal-state comity interests, but it both delays and enhances uncertainty as to whether accrual has taken place.

The decision below, requiring a fact-based inquiry to determine whether a cause of action has accrued, effects uncertainty in determining the date of accrual. The uncertainty is injurious to both plaintiffs and defendants:

> On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose.
>
> [*Wilson, supra*, 471 U.S. at 275 n. 34].

The uncertainty about the date of accrual unwisely encourages plaintiffs to file prophylactic complaints to avoid the expiration of the statute of limitations.

Neither the decision below nor any of the circuit decisions adopting the fact-based approach has taken into account recent statements of this Court suggesting that *Heck*'s footnote seven should be afforded an expansive rather than a narrow interpretation. In *Nelson v. Campbell*, 541 U.S. 637 (2004), this Court stated:

> [W]e were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to *§ 1983* in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." 512 U.S., at 487, n. 7 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination -- suits that could otherwise have gone forward had the plaintiff not been convicted.
>
> [*Id.*, at 647 (emphasis in the original)].

The accrual of *§ 1983* claims is delayed more often by the fact-based approach adopted by the majority opinion below than by the categorical approach urged by the dissenting opinion below. The fact-based approach is inconsistent with the goal not to "cut off potentially valid damages actions as to which a [convicted] plaintiff might never [otherwise] obtain favorable termination." *Ibid.*

Petitioners submit that the decision below misconstrues *Heck*'s footnote seven and is contrary to important policy goals and federal-state comity interests. But whether the decision is or is not correct, this Court should grant the writ on both questions presented to resolve the circuit split and the confusion that courts have encountered in construing *Heck*'s footnote seven.

B. This Court Should Grant the Writ on the First Question Presented to Resolve Whether *Heck*'s Delayed-Accrual Rule Applies to *§ 1983* Claims that are not Cognizable in Habeas Corpus.

In light of recent decisions by this Court suggesting that *Heck*'s delayed-accrual rule does not apply to *§ 1983* claims that are not cognizable in habeas corpus, clarification of *Heck*'s footnote seven should include resolution of whether, independent of the analysis advanced in footnote seven, delayed accrual is proper for the type of *§ 1983* claim that was the subject of footnote seven - Fourth Amendment claims of unlawful search. Although habeas corpus claims may be premised on a variety of constitutional violations, they may not be based upon violations of the Fourth Amendment "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Stone v. Powell*, 428 U.S. 465, 482 (1976). This Court should grant the writ on the first question presented because it seeks clarification of *Heck*'s footnote seven for respondent Gibson's claim of unlawful search, which is not cognizable in habeas corpus.

The *Heck* delayed-accrual rule derived in part from the need to harmonize the procedural requirements of habeas corpus with those of *42 U.S.C. § 1983* and to ensure that a prisoner must seek habeas relief before prosecuting a *§ 1983* claim that would, if successful, imply the invalidity of his or her conviction or sentence. *Heck*, *supra*, 512 U.S. at 480-82. In *Spencer v. Kemna*, 523 U.S. 1 (1998), five Justices of this Court endorsed the proposition that the unavailability of habeas relief permits a *§ 1983* action to accrue regardless of whether

the success of the action would necessarily imply the invalidity of the conviction or sentence. Justice Souter, writing for four members of the Court, stated in a concurrence that "a former prisoner, no longer in custody, may bring a *§ 1983* action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." 523 U.S. at 21 (Souter, J., concurring; internal quotations omitted). Justice Stevens, in dissent, noted that "given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear, as Justice Souter explains, that he may bring an action under *42 U.S.C. § 1983*." *Id.*, at 25 n. 8 (Stevens, J., dissenting). See also *Muhammad v. Close*, 540 U.S. 749, 752 n. 2 (2004) ("Members of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement.").

Whether *Heck* now applies to claims not cognizable in habeas corpus has troubled circuit courts. *Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (relying upon *Spencer* to hold that in certain limited cases, *Heck* does not apply to a *§ 1983* claim if habeas relief is unavailable). *cert. denied*, 540 U.S. 1218 (2004); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (discussing *Heck* and *Spencer* and concluding that a *§ 1983* action challenging denial of credit for time served in pre-trial incarceration was not barred by *Heck* because the incarceration had been fully served and habeas was unavailable); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 n. 3 (6th Cir.) (noting that *Spencer* casts doubt upon whether *Heck* applies to prisoners no longer incarcerated for whom habeas relief is not available), *cert. denied*, 528 U.S. 1021 (1999); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999) (State will not be relieved of waiver of *Heck* defense because *Heck* does not appear to apply to plaintiff challenging loss of good-time credits after release from prison, when habeas is unavailable). Noting that *Stone v. Powell*, 428 U.S. 465 (1976), forecloses habeas relief for Fourth Amendment claims of unlawful search, the dissenting opinion below "doubt[ed]

that [this] Court had Fourth Amendment claims in mind when it spoke [in *Heck*] of claims that would necessarily imply the invalidity of a conviction or sentence." (App., infra, 17a; internal quotations and internal brackets omitted).

Petitioners endorse the reasoning of the dissenting opinion below. Even if, in general, *Heck*'s footnote seven should be construed to require a fact-based inquiry, no fact-based inquiry is proper for claims of Fourth Amendment unlawful search because these claims are not cognizable in habeas corpus and these claims accrue even if, when successful, they necessarily imply the invalidity of the conviction or sentence. But in any event, this Court should grant the writ on the first question presented so as to resolve this issue and provide the clarification that the divided circuit courts need in construing and applying *Heck*'s footnote seven to *§ 1983* claims that are not cognizable in habeas corpus.

C. This Court Should Grant the Writ on the Second Question Presented to Provide Clarification in Applying *Heck*'s Footnote Seven to Claims as to Which the Absence of Habeas Corpus Relief Cannot Independently Bar *Heck*'s Delayed Accrual.

The second question presented asks whether a *§ 1983* plaintiff's claim that the police selectively enforced the laws against plaintiff in violation of the Equal Protection Clause is subject to the *Heck* delayed-accrual rule because the enforcement led to the discovery of evidence used to convict the plaintiff at his or her criminal trial. Petitioners have not argued and do not now argue that Equal Protection selective-enforcement claims are not cognizable in habeas corpus, and petitioners are unaware of any decision adopting the rationale of *Stone v. Powell*, 428 U.S. 465 (1976), to Equal Protection claims of selective enforcement. The second question affords this Court the opportunity to clarify *Heck*'s footnote seven when it is extended to claims as to which the absence of habeas corpus relief cannot independently bar *Heck*'s delayed accrual.

Cf. *Heck*, *supra*, 512 U.S. at 480 n. 2 (this Court will not consider arguments against delayed accrual that were not raised by the petitioner).

A subsidiary issue raised by the second question is whether it implicates *Heck*'s footnote seven. The decision below held that "a successful claim of selective enforcement under the Fourteenth Amendment Equal Protection Clause would have necessarily invalidated Gibson's conviction" (App., *infra*, 22a) rather than merely have resulted in suppression of the discovered evidence. On this holding the decision below concluded that the construction of *Heck*'s footnote seven is not implicated in respondent Gibson's selective enforcement claim. *Ibid.* The reasoning of the decision below was flawed, and this Court should grant the writ on the second question presented to determine whether any remedy greater than suppression is proper for Equal Protection claims of selective enforcement.

This Court in *United States v. Armstrong*, 517 U.S. 456, 461 n. 2 (1996), left open as an unresolved issue "whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of [selective] prosecution on the basis of his race." See also *United States v. Chavez*, 281 F.3d 479, 486-87 (5th Cir. 2002) ("Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Protection Clause, and we do not find it necessary to reach that issue here.") The second question presented raises the simpler issue whether any remedy greater than suppression is proper if a court determines that a defendant has been the victim of selective enforcement rather than selective prosecution. Because this issue is narrower and simpler than the issue left unresolved in *Armstrong*, this Court may wish to resolve it first. Cf. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 n. 10 (1999) (expressing preference in Equal Protection selective-treatment cases to resolve "narrower" rather than more general constitutional issues); *United States v. Hare*, 308 F. Supp. 2d 955, 961 n.2 (D. Neb. 2004) ("there is little or no federal

authority for imposing the remedy of dismissal or suppression [based upon the defendants' contention that] the state trooper violated the defendants' equal protection and travel rights. Like [the magistrate judge], I do not reach this question, although it is an issue which cries out for resolution by the appellate courts.").

The decision below correctly understood that respondent Gibson's complaint alleged at most a claim of selective enforcement rather than selective prosecution of the drug laws. (App., *infra*, 20a-22a). This Court concluded in *Whren v. United States*, 517 U.S. 806, 813 (1996), that "the Constitution prohibits selective enforcement of the law based on considerations such as race" and that a vehicular stop may comply with the Fourth Amendment and yet violate the Equal Protection Clause if it was motivated by an impermissible racial animus but for which the stop would not have occurred. This Court also held in *Armstrong* that an accused does not state an Equal Protection claim for selective prosecution unless he or she can prove "that similarly situated individuals of a different race were not prosecuted." *Armstrong*, *supra*, 517 U.S. at 465.

Like respondent Gibson, criminal defendants alleging that drugs were found as a consequence of law enforcement officers' stopping their vehicles because of membership in a constitutionally protected class do not meet the *Armstrong* standard for an Equal Protection claim of selective prosecution of the drug laws because "similarly situated individuals" outside the class who are found with drugs in their vehicles are inevitably prosecuted. Thus, like respondent Gibson, these criminal defendants state at most a claim that they suffered selective prosecution of the traffic laws, although the drugs may have been discovered as the result of *Whren*-type selective enforcement. *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("Barlow complains not of selective prosecution, but of racial profiling, a selective enforcement tactic."), *cert. denied*, 538 U.S. 1066 (2003); *United States v. Avery*, 137 F.3d 343, 353-54 (6th Cir. 1997) (setting forth

elements of selective enforcement without the requirement that similarly-situated persons were not prosecuted).

Courts have noted but failed to resolve whether there are distinctions between selective enforcement and selective prosecution and the remedies for each. *Jones v. Sterling*, 110 P.3d 1271, 1275 n.3 (Ariz. 2005) (noting that this Court has not determined whether dismissal of the indictment or some other sanction is the proper remedy for selective prosecution, and similarly declining to determine whether dismissal or some other sanction is the proper remedy for selective enforcement of the drug laws based upon racial profiling); *Bryan v. City of Madison*, 213 F.3d 267, 276-77 (5th Cir. 2000) (discussing "selective enforcement" and "selective prosecution" and failing to note a distinction), *cert. denied*, 531 U.S. 1145 (2001); *State v. Ballard*, 331 N.J. Super. 529, 540, 752 A.2d 735, 740 (N.J. Super. Ct. App. Div. 2000) ("We need not, at this juncture, consider whether there is any difference with respect to a claim of selective enforcement by arresting officers and one involving selective prosecution by the State or prosecuting attorney. We reserve for future development any differences in remedy."). In the criminal context, the United States has advanced the argument "that suppression is not a remedy for an equal protection violation" whatever the basis for the claim. *United States v. Pollard*, 209 F. Supp. 2d 525, 538 (D.V.I. 2002), *rev'd on other grounds*, 326 F.3d 397 (3d Cir.), *cert. denied*, 540 U.S. 932 (2003).

The decision below, holding that dismissal of the criminal charges rather than some lesser sanction such as suppression of evidence is the proper remedy for claims of selective enforcement, creates a conflict between federal and state courts in New Jersey. The Supreme Court of New Jersey has held that the proper sanction is suppression of the evidence that is the result of selective enforcement. *State v. Segars*, 172 N.J. 481, 492-93, 799 A.2d 541, 548-49 (2002) ("Once it has been established that selective enforcement has occurred" the fruits thereof "will be suppressed" in the interest of "deterrence of impermissible investigatory behavior and maintenance of the

integrity of the judicial system"). Even prior to the Supreme Court of New Jersey's opinion, no state court in New Jersey had imposed any remedy greater than suppression. *State v. Ballard*, 331 N.J. Super. 529, 540, 752 A.2d 735, 740 (N.J. Super. Ct. App. Div. 2000) (raising but declining to resolve the issue); *State v. Soto*, 324 N.J. Super. 66, 83, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (court will suppress evidence if it finds "an officially sanctioned or de facto policy of targeting minorities for investigation and arrest").

As the district court in this case understood (App., *infra*, 66a), the proper remedy for selective enforcement is at most suppression, and the decision below erred in concluding that dismissal of the charges rather than some lesser sanction such as suppression of the drugs would have been the proper remedy for respondent Gibson's Equal Protection claim at his criminal trial. The government should be permitted to prosecute a criminal matter, even one originating from selective enforcement in violation of the Equal Protection Clause, so long as the prosecutor has untainted evidence or so long as it was inevitable that untainted evidence would have been discovered. See *United States v. Pollard*, 209 F. Supp. 2d 525, 538 (D.V.I. 2002) (suppression of evidence obtained in contravention of defendant's equal protection rights would be viable sanction because sanction would fully comport with objective of the exclusionary rule as judicially created remedy designed to safeguard rights generally), *rev'd on other grounds*, 326 F.3d 397 (3d Cir.), *cert. denied*, 540 U.S. 932 (2003).

This Court should grant the writ on the second question presented and clarify whether any remedy greater than suppression of evidence at the defendant's criminal trial is proper for a claim that selective enforcement of the laws in violation of the Equal Protection Clause led to the discovery of inculpatory evidence. This Court should also grant the writ on the second question presented and resolve whether a *§ 1983* plaintiff's claim that the police selectively enforced the laws against the plaintiff in violation of the Equal Protection Clause is subject to delayed accrual because the enforcement led to the

discovery of evidence used to convict the plaintiff at his or her criminal trial. Because no remedy greater than suppression is proper for a claim of selective enforcement, resolution of *Heck*'s delayed-accrual rule in this context would resolve the circuit split concerning *Heck*'s footnote seven for claims as to which the absence of habeas corpus relief cannot independently bar *Heck*'s delayed accrual.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on both of the questions presented.

Respectfully submitted,
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Dated: December 15, 2005

APPENDICES

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1847

EMORY E. GIBSON, JR.

Appellant

v.

SUPERINTENDENT OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY-DIVISION OF STATE POLICE; NEW JERSEY TURNPIKE AUTHORITY; SEAN REILLY; J.W. PENNYPACKER; PETER VERNIERO; RONALD SUSSWEIN; JOHN FAHY; GEORGE ROVER; JOHN DOES 1-10; TREASURER STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 02-cv-05470)
District Judge: Honorable Robert B. Kugler

Argued February 11, 2005

Before: BARRY, FUENTES, and VAN ANTWERPEN,
Circuit Judges

(Filed: June 15, 2005)

OPINION[1]

VAN ANTWERPEN, *Circuit Judge*

Emory Gibson, Jr. appeals from two orders of the District Court which effectively dismissed his § 1983 action in its entirety. According to Gibson, in 1992 he was traveling on the New Jersey Turnpike when he was unlawfully stopped, searched and arrested by two New Jersey State Police Troopers. Gibson alleges that the stop and search were part of a pattern of racially discriminatory law enforcement practices undertaken by the New Jersey State Police. Ten years after his initial stop and eight years after his conviction, Gibson was released from prison after newly obtained evidence suggested that his initial stop was tainted by racial animus. He subsequently brought this action against the New Jersey State Police ("NJSP") Superintendent;[2] J.W. Pennypacker and Sean Reilly,[3] the individual NJSP Troopers who originally arrested him; former New Jersey Attorney General Peter Verniero; former Deputy Attorneys General Ronald Susswein, John Fahy, and George Rover;[4] the New Jersey Turnpike Authority; the Treasurer of

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[1] This Opinion represents the Opinion of the Court on all issues except the discussion of the Fourth Amendment claims in Part III.A. The Opinion of the Court on those issues is contained in the Opinion of Judge Fuentes filed herewith (hereinafter referred to as "Judge Fuentes's Opinion").

[2] The claim against the Superintendent was for injunctive relief only.

[3] J.W. Pennypacker and Sean Reilly are collectively referred to as "the Troopers."

[4] We refer to Peter Verniero, Ronald Susswein, John Fahy, and George Rover collectively as the "Attorney General defendants."

New Jersey; and several unnamed "John Doe" individuals who allegedly aided in the illegal search or the suppression of evidence.

In federal claims brought under 42 U.S.C. §§ 1983 and 1985, Gibson alleged that the defendants violated his right of access to the courts, his Fourth Amendment right to freedom from illegal search and seizure, and his Fourteenth Amendment right to equal protection under the law. He also alleges that the defendants conspired to violate these rights and conspired against him on account of his race. Additionally, Gibson brought several claims under state law. The District Court dismissed all of the claims as set forth below.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The following facts are taken from Gibson's Complaint. Because we are reviewing the grant of a motion to dismiss, we take these allegations as true and view them in a light most favorable to the appellant. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002).

Emory Gibson, Jr. is an African-American male. On October 28, 1992, Gibson was sitting in the rear seat of a vehicle occupied by two other African-American men, traveling southbound on the New Jersey Turnpike. At approximately 4:20 a.m., New Jersey State Police Troopers Pennypacker and Reilly pulled their marked NJSP cruiser behind the car in which Gibson was traveling and activated the cruiser's warning lights; the driver promptly pulled over. Without a warrant, the Troopers searched the vehicle and then searched and arrested Gibson. Gibson and the other occupants of the vehicle were charged with various offenses after the Troopers discovered illegal drugs in the car. Gibson alleges that the Troopers stopped the car and conducted the search without probable cause.

Gibson was tried on April 20 and 21, 1994. He was found guilty on two counts of drug-related offenses and sentenced to fifty years in prison. At trial, the prosecution relied on the testimony of Troopers Pennypacker and Reilly, as well as Dennis Tully, who testified as an expert on drug interdiction and valuation. According to Gibson, impeachment evidence existed at that time which showed that Trooper Tully had a "monthly African-American arrest rate on the Turnpike." (Appellant App. at A-93.)

In 1996, the Superior Court of New Jersey in *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996), determined that NJSP Troopers were racially profiling drivers on the New Jersey Turnpike and targeting African-Americans for stops. Citing *Soto*, Gibson filed a petition for post-conviction relief and requested discovery on February 18, 1999. On February 8, 2000, the Superior Court, Law Division, denied the request for post-conviction relief, in part because Gibson did not allege sufficient evidence of racial profiling or the illegality of his stop and arrest.

Later, on January 29, 2002, the Superior Court of New Jersey, Appellate Division, reversed Gibson's conviction because exculpatory material uncovered in November 2000 tended to show that he was illegally stopped and arrested. On April 19, 2002, Gibson's Motion to Dismiss and Vacate the Conviction of Plaintiff was granted because there was a colorable basis to believe that Gibson was stopped and arrested as a result of unlawful racial profiling.

On November 14, 2002, Gibson filed a Complaint in the United States District Court for the District of New Jersey, in which he made six claims. Counts One, Two and Three were brought under 42 U.S.C. § 1983. In Count One, Gibson claimed that the defendants' unconstitutional acts denied him effective access to the courts and resulted in his unconstitutional

conviction and imprisonment. In Count Two, he sought injunctive relief from the NJSP Superintendent[5] and in Count Three, he alleged that the defendants "conspired to violate Plaintiffs civil rights, namely the rights to meaningful access to the courts and the right to be free from unconstitutional conviction and imprisonment." (Appellant App. at A-103.) In Count Four, Gibson alleged that the defendants were liable under 42 U.S.C. § 1985 for conspiring "to violate the civil rights of Plaintiff herein based on his race." (*Id.* at A-103 to A-104.) Counts Five and Seven (there was no Count Six) were state law claims.

Appellees moved to dismiss all of the counts, arguing that they were time-barred, and that several of the defendants were entitled to Eleventh Amendment immunity, prosecutorial immunity and qualified immunity. On December 12, 2003, the District Court dismissed as time-barred Gibson's "constitutional claims for selective enforcement and failure to train (as well as any claims that reasonably can be construed to plead violations of the Fourth Amendment and malicious prosecution)." (Appellant App. at A-36.) The District Court also dismissed the claim against the defendant Treasurer of New Jersey and ordered further briefing and argument on the issue of qualified immunity as to the surviving claims. On February 24, 2004, the District Court dismissed the remaining claims. Gibson timely appealed.

Consistent with this opinion and the Judge Fuentes's Opinion, we will reverse, and allow Gibson to proceed with his claims brought under 42 U.S.C. § 1983 in Count One alleging that the Troopers unconstitutionally searched and seized Gibson in violation of the Fourth Amendment, and subjected him to selective enforcement of the laws in violation of the

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[5] Gibson's counsel stated at oral argument that they are no longer pursuing this claim.

Equal Protection Clause of the Fourteenth Amendment. We will also reinstate the 42 U.S.C. §§ 1983 and 1985 conspiracy claims in Counts Three and Four, and the state law claims in Counts Five and Seven.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2005). This Court has jurisdiction over the final order and judgment pursuant to 28 U.S.C. § 1291 (2005). We exercise plenary review over both the District Court's dismissal of a claim on statute of limitations grounds under Fed. R. Civ. P. 12(b)(6) and its grant of qualified immunity. *Leveto v. Lapina*. 258 F.3d 156, 161 (3d Cir.2001).

III. ANALYSIS

The nature of Gibson's multiple claims in Count One is somewhat difficult to ascertain so we begin by examining the complaint.[6] Count One was brought under 42 U.S.C. § 1983

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[6] Count One of Gibson's Complaint states in its entirety:

81. Defendants, under the color of state law, *deprived Plaintiff of his constitutional and civil right to meaningful access to the courts,* derived from Article IV, the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, *and the right to be free from an unconstitutional conviction and imprisonment* by, among other things:

- Detaining Plaintiff without probable cause;
- Searching and seizing the car Plaintiff was in without probable cause;
- Searching Plaintiff without probable cause;
- Arresting Plaintiff without probable cause;
- Falsely imprisoning Plaintiff;
- Improperly denying Plaintiff access to fair and

meaningful judicial proceedings during his criminal trial, subsequent post-conviction proceedings and separate civil suits by suppressing evidence beneficial to Plaintiff in violation of *Brady v. Maryland*, similar state law and ethical duties;

- Depriving Plaintiff of his constitutional right to equal. protection of the laws;
- Imprisoning Plaintiff unconstitutionally for a charge later vacated by motion of the State;
- Failing to train subordinates;
- Failing to supervise/control subordinates;
- Failing to correct the unconstitutional/discriminatory practices of subordinates;
- Continually condoning and ratifying a history of unconstitutional/discriminatory acts despite numerous allegations over the years of discrimination based on race;
- Improperly screening, hiring, training, supervising, disciplining and retaining dangerous police officers.

82. The above acts constitute a violation of the Civil Rights Act, 42 U.S.C. § 1983 for a violation of one's civil and constitutional rights under the color of Statelaw.

83. But for the Defendants' unlawful acts, Plaintiff would not have been denied meaningful access to the courts in his criminal proceedings and post-conviction relief proceedings; and would have been able to bring a civil cause of action against Defendants for Plaintiffs civil rights violations.

84. As a direct result of Defendants' unlawful acts which denied Plaintiff his right to access the courts, Plaintiff cannot seek remedy by way of causes of action mentioned in the previous paragraph since they are either time barred or moot.

which provides a cause of action against a person who, acting under color of state law, deprives another of a constitutional or federal right. Thus, to state a claim under § 1983, Gibson must indicate: (1) of what constitutional or federal right he was deprived, and (2) how he was deprived of that right under color of state law. 42 U.S.C. § 1983 (2005); *Basista v. Weir*, 340 F.2d 74, 79 (3d Cir. 1965).

The first step in evaluating a § 1983 claim is to identify the specific constitutional right infringed. *Albright v. Oliver*. 510 U.S. 266, 271 (1994) (Rehnquist, C.J., plurality opinion). It appears that in Count One, Gibson's Complaint alleges two main claims of constitutional deprivation: (1) defendants denied Gibson access to the courts by suppressing exculpatory information, and (2) defendants violated Gibson's "right to be free from an unconstitutional conviction and imprisonment." (Appellant App. at A-100 to A-101.) The Complaint then alleges a litany of constitutional violations which underlie the main claims. *Id.* at A-101 to A-102.

The main claim of denial of access to the courts is well recognized and actionable. *Christopher*, 536 U.S. at 415 n.12. However, standing alone without more supporting detail, Gibson's other main claims concerning his right to be free from

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85. As a proximate result of the aforementioned acts. Plaintiff has b,en damaged and has suffered severe emotional injuries, including mental distress and anguish.

(Appellant App. at A-100 to A-103) (emphasis added.)

unconstitutional conviction and imprisonment[7] appear to be more in the nature of legal conclusions or merely a description of the type of harm Gibson allegedly suffered. Recognizing this, the District Court read Count One of the Complaint as alleging a denial of access to the courts claim, as well as individual claims under the Fourth and Fourteenth Amendments. (Appellant App. at A-20 to A-28.) Specifically, Gibson claimed that his constitutional rights were violated: (A) when Troopers Pennypacker and Reilly searched and seized Gibson on the New Jersey Turnpike in violation of the Fourth Amendment, (B) when the Troopers racially profiled Gibson and thereby subjected him to discriminatory enforcement of the law in violation of th Equal Protection Clause of the Fourteenth Amendment, (C) when the Troopers and Attorney General defendants denied him effective access to the courts by suppressing exculpatory evidence, and (D) when the NJSP and

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[7] At the outset, we note that Gibson was not pursuing a malicious prosecution claim. (Appellant App. at A-22). It appears that Gibson may have simply quoted the phrase "unconstitutional conviction or imprisonment" from the Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), which held that "*to recover damages for allegedly unconstitutional conviction or imprisonment*, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." (footnote omitted) (emphasis added).

As noted *infra*, *Heck* holds that the statute of limitations on certain claims does not run until the underlying conviction is set aside. However, Gibson cannot avoid the statute of limitations applicable to § 1983 claims not covered by *Heck* by merely cloaking such claims in the "right to be free from an unconstitutional conviction and imprisonment." With the possible exception of malicious prosecution claims, such cloaking would, in effect, nullify the statute of limitations for all of Gibson's § 1983 claims, and we believe this is why the District Court read the Complaint as it did.

the New Jersey Turnpike Authority ("NJTA") failed to properly train and discipline the Troopers in question. *Id.* The parties did not dispute this characterization of the Complaint in their briefs or at oral argument, thus we will interpret the Complaint in this way.

A. Fourth Amendment Claims

We begin by addressing Gibson's claim that the Troopers violated his Fourth Amendment rights.[8] The District Court concluded that all of the various ways by which Gibson alleges his Fourth Amendment rights were violated were barred by the statute of limitations.

An action brought under 42 U.S.C. § 1983 is subject to the state statue of limitations that governs actions for personal injury. *Cito v. Bridgewater Township Police Dep't.* 892 F.2d 23, 25 (3d Cir. 1989). "In New Jersey that statute is N.J.S.A. 2A: 14-2, which provides that an action for an injury to the person caused by a wrongful act, neglect, or default, must be convened within two years of accrual of the cause of action." *Id.* (quoting *Brown v. Foley*, 810 F.2d 55, 56 (3d Cir. 1987)) (internal quotation marks omitted). Although state law governs the limitations period, it is federal law that governs the accrual of § 1983 claims. *Montgomery v. De Simone*. 159 F.3d 120, 126 (3d Cir. 1998).

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[8] The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Generally, "the limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action." *Id.* at 126 (quoting *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991)) (internal quotation marks omitted). However, this rule does not apply when a plaintiff brings a § 1983 action that, if successful, would demonstrate that the plaintiff's underlying criminal conviction or imprisonment is invalid. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). In such a situation, no cause of action arises until the conviction or sentence is invalidated, and the statute of limitations does not begin to run until the time of such invalidation. *Id.* at 489. In the case before us, the arrest, and other multiple alleged illegal acts all occurred more than two years before this suit was brought, and therefore all would be barred by the two-year statute of limitations. The dispute between the parties is whether or not these claims are saved from being untimely because they fall under the *Heck* delayed accrual rule, and did not accrue until Gibson's conviction was set aside in 2002.

In *Heck v. Humphrey*, Heck brought a § 1983 suit while his criminal appeal was pending. *Id.* at 479. Heck alleged numerous constitutional violations in the conduct of his trial, and requested compensatory and punitive money damages, but no injunctive relief. *Id.* The Supreme Court concluded that such a claim was not cognizable under § 1983 until Heck's conviction or sentence had been invalidated, not because there was an exhaustion requirement, but simply because no claim existed until that time. *Id.* at 489. As the Court explained, "to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such

determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." *Id.* at 486-87 (footnote omitted).

Nevertheless, the Supreme Court in *Heck* was careful to explain that not all constitutional claims arising from an arrest and prosecution are the kind that are subject to the deferred accrual rule. Some claims would not necessarily invalidate a conviction. The Court laid particular emphasis on Fourth Amendment claims in footnote seven, explaining:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, see *Murray v. United States*, 487 U.S. 533, 539 (1988), and especially harmless error, see *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991), such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiffs conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, see *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986), which, we hold today, does *not* encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Heck, 512 U.S. at 487.

This Court dealt with the applicability of *Heck* in *Montgomery v. De Simone*, 159 F.3d at 126. In *Montgomery*, the plaintiff Rosemary Montgomery was arrested and charged with speeding, drunk driving, and refusing to take a

breathalyser test. *Id.* at 123. At her municipal hearing, she introduced evidence that she was not drunk or speeding, and that at the time of her arrest, the arresting officer had propositioned her. *Id.* at 122-23. Although a municipal judge found her guilty, later the Superior Court of New Jersey, in a trial *de novo*, reversed the convictions. *Id.* at 123. After her convictions were overturned, she brought an action against the arresting officer in the United States District Court for false arrest and false imprisonment. *Id.* The District Court ruled that her claims accrued at her arrest and were time-barred by the statute of limitations. *Id.*

In affirming the dismissal, this Court explained that "[i]t is axiomatic that under federal law, which governs the accrual of section 1983 claims, the limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action.. . . Accordingly, under *Gentry*, [sic] the two-year limitation period for Montgomery's section 1983 false arrest and false imprisonment claims began to run on September 30, 1992, the night of Montgomery's arrest and detention." *Id.* at 126 (internal quotation marks omitted). In a footnote, we explained that Montgomery's claim was not subject to the *Heck* accrual rule:

> Montgomery argues that under *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), these claims only accrued after her criminal charges were resolved in her favor. In *Heck*, the Court held that a section 1983 claim for damages attributable to an unconstitutional conviction or sentence does not accrue until that conviction or sentence has been invalidated. *Heck*, 512 U.S. at 489-90, 114 S.Ct. 2364. The Court also noted, however, that if a successful claim would not demonstrate the invalidity of any outstanding criminal

> judgment, it should be allowed to proceed. *Id.* at 487, 114 S.Ct. 2364. Because a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest, we find that Montgomery's claims for false arrest and false imprisonment are not the type of claims contemplated by the Court in *Heck* which necessarily implicate the validity of a conviction or sentence. See *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir.1995) (stating that "[i]t is well established that a claim of unlawful arrest, standing alone, does not *necessarily* implicate the validity of a criminal prosecution following the arrest."). Accordingly, we read *Heck* to be consistent with our determination that Montgomery's false arrest and false imprisonment claims accrued on the night of her arrest.

Montgomery, 159 F.3d at 126 n.5.

Gibson's Complaint lists multiple Fourth Amendment claims[9] including claims that Troopers Pennypacker and Reilly violated his rights by detaining and arresting him without probable cause and falsely imprisoning him. We view these claims as claims of false arrest or imprisonment. *See*

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[9] Gibson claims that the Troopers violated the Fourth Amendment by:

- Detaining Plaintiff without probable cause;
- Searching and seizing the car Plaintiff was in without probable cause;
- Searching Plaintiff without probable cause;
- Arresting Plaintiff without probable cause;
- Falsely imprisoning Plaintiff;

(Appellant App. at A-101.)

Porterfield v. Lott, 156 F.3d 563, 568 (4th Cir. 1998) ("[A]llegations that a warrantless arrest or imprisonment was not supported by probable cause advanced a claim of false arrest or imprisonment . . . ."). *Montgomery*, 159 F.3d at 126 n.5, states that "[b]ecause a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest, . . . claims for false arrest and false imprisonment are not the type of claims contemplated by the Court in *Heck*." We view this language as sufficient to clearly exclude Gibson's Fourth Amendment claims of false imprisonment, and arrest and detention without probable cause from the *Heck* deferred accrual rule.

Other circuits have taken a position similar to our decision in *Montgomery*. *See Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 (10th Cir. 1999) (holding that arrest, interrogation, and search and seizure claims accrue when they actually occur and *Heck* does not affect them because ultimate success on them would not necessarily question the validity of a conviction); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (the admission of a coerced confession is similar to the admission of illegally seized evidence which does not necessarily imply the invalidity of a conviction, thus a cause of action accrues immediately).[10]

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[10] Gibson argues that we should engage in a fact-intensive analysis of each of his claims to determine if they would necessarily imply that his underlying conviction is unlawful. To be certain, some courts have engaged in a fact-intensive analysis of each claim. *Wiley v. City of Chicago*, 361 F.3d 994, 997 (7th Cir. 2004) ("*Heck* may in fact occasionally bar a civil rights claim premised on a false or wrongful arrest."); *Ballenger v. Owens*, 352 F.3d 842, 846 (4th Cir. 2003) (holding on facts similar to this case that when evidence seized in violation of the Fourth Amendment is the only evidence underlying a conviction, a successful civil challenge would necessarily imply the invalidity of the conviction); *Hughes v. Lott*, 350 F.3d 1157, 1161(11th Cir. 2003); *Harvey v. Waldron*, 210F.3d 1008, 1015 (9th Cir. 2000); *Covington v. City of New York*, 171 F.3d 117, 119 (2d Cir. 1999)

After a thorough review of *Heck*, I conclude that Gibson's Fourth Amendment claims that he was searched and the car was searched and seized without probable cause are not subject to the *Heck* deferred accrual rule because they do not necessarily imply that Gibson's underlying state court conviction was unlawful. *Heck*, 512 U.S. at 487. *Heck* was an attempt by the Supreme Court to reconcile federal habeas corpus law with § 1983 civil claims. In *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1972), a forerunner of *Heck*, the Supreme Court rejected the premise that a person could circumvent federal habeas corpus exhaustion requirements by merely

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(supporting a fact-based inquiry); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996) (plaintiff may not sue for an unlawful seizure if success would imply that the only evidence of the crime must be suppressed).

We did not engage in such a fact-intensive analysis in *Montgomery v. De Simone*, and we note that the Tenth Circuit expressly rejected such an approach in *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 559 n.4 (10th Cir. 1999). Moreover, the fact-intensive approach would require us to answer difficult questions about what might have happened in lower court criminal proceedings. *Heck* prohibits civil actions which would question the validity of underlying criminal convictions and we are not inclined to do that in order to determine whether or not *Heck* is applicable.

Even if we were to adopt the fact-intensive analysis Gibson argues for, we could not conclude that exclusion of the evidence in this case would *necessarily* have invalidated Gibson's underlying state-court conviction. We cannot say what other evidence of guilt may have been present or whether there may have been a valid reason for stopping the vehicle other than race. The Supreme Court in *Heck* noted the possible applicability of other doctrines such as independent source, inevitable discovery, and harmless error. *Heck*, 512 U.S. at 487 n.7.

We have before us only nine pages of the trial court record and on this record we are unable to determine what caused the police to stop the vehicle. In particular, it is difficult to support conclusion in Judge Fuentes's Opinion that the only evidence supporting the criminal conviction was obtained as a result of an unlawful racial profiling stop. In fact, at oral argument counsel suggested that the car in which Gibson was traveling violated the motor vehicle code.

seeking injunctive relief in a § 1983 action. *Preiser* "held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." *Heck*, 512 U.S. at 481. However, *Preiser* left open the question of what happens when a person seeks only monetary relief in a § 1983 suit, but would nonetheless demonstrate the invalidity of his or her conviction if successful. *Id. Heck* dealt with this question.

In *Heck*, the Court specified that it was operating at the intersection of the Civil Rights Act and the federal habeas corpus statute, *Id.* at 480, as it addressed "the question posed by § 1983 damages claims that do call into question the lawfulness of conviction or confinement," but do not seek equitable relief, id. at 483. Accordingly, we doubt that the Court had Fourth Amendment claims in mind when it spoke of claims that "would necessarily imply the invalidity of [a] conviction or sentence." *Id.* at 487. We say this because although habeas corpus claims may be premised on many different constitutional violations, they may not be based upon violations of the Fourth Amendment "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Stone v. Powell*, 428 U.S. 465, 482 (1976).

"'A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.'" *Id.* at 490 (quoting *Kaufman v. United States*, 394 U.S. 217, 237 (1969) (Black J., dissenting)). The exclusionary rule is a judicially created remedy for criminal cases meant to deter deprivations of the Fourth Amendment, but it is not itself a personal constitutional right of the aggrieved party. *United*

States v. Calandra, 414 U.S. 338, 348 (1974). Therefore, as the Supreme Court has explained, "[w]hether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

A court in a civil action can decide that an individual was subjected to an illegal search or seizure without reaching the issue of whether the evidence found pursuant to that act should have been excluded from the criminal trial. Although a successful Fourth Amendment civil claim might suggest that certain evidence should have been excluded at a criminal trial, that issue will never be reached in the civil context and therefore, the successful civil claim will not necessarily imply the invalidity of the underlying criminal conviction."[11]

Footnote six in the *Heck* opinion demonstrates a narrow exception to the general statement in footnote seven that a

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[11] "Judge Fuentes's Opinion ignores this point, and instead surmises that because Gibson's conviction rests solely on evidence discovered during his arrest, success on Gibson's false arrest claim would "necessarily imply" that he was improperly convicted. Op. of Fuentes, J. at 10. However, this does not square with the Supreme Court's admonition that the exclusionary rule is not a personal constitutional right. *Stone v. Powell*, 428 U.S. 465, 480-81 (1976). "[A] Fourth Amendment violation is 'fully accomplished' by the illegal search or seizure, and no exclusion of evidence from a judicial or administrative proceeding can 'cure the invasion of the defendant's rights which he has already suffered.' *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 906 (1984)). Thus, "the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Id.* It is therefore hard to understand how we can decide, in a collateral matter, that New Jersey's introduction of evidence obtained in violation of the Fourth Amendment would necessarily invalidate Gibson's conviction.

successful Fourth Amendment claim "would not *necessarily* imply that the plaintiff's conviction was unlawful," *Heck*, 512 U.S. at 487 n.7. As footnote six[12] explains, where a successful Fourth Amendment violation would actually "negate an element of the offense of which [the plaintiff] has been convicted" the claim undermines the *charge* under which the defendant was convicted, as contrasted with merely undermining *evidence* supporting the underlying conviction. *Id.* at 487 n.6. This narrow exception is not present in the case before us.

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[12] Footnote 6 states:

> An example of this latter category—a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiffs criminal conviction was wrongful—would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. (This is a common definition of that offense. See *People v. Peacock*, 68 N.Y.2d 675, 505 N.Y.S.2d 594, 496 N.E.2d 683 (1986); 4 C. Torcia, Wharton's Criminal Law § 593, p. 307 (14th ed. 1981).) He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concerning res judicata, see n.2, *supra*, the § 1983 action will not lie.

Heck, 512 U.S. at 486-87 n.6.

For the reasons stated above, I would affirm the dismissal of all claims seeking damages for violations of Gibson's Fourth Amendment rights as these claims are time-barred.[13]

B. *Fourteenth Amendment Claims*

Gibson also challenges the District Court's dismissal of his claim in Count One that Troopers Pennypacker and Reilly subjected him to racially selective law enforcement practices in

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[13] I am troubled by the statement in Judge Fuentes's Opinion that, "Viewing the evidence in the light most favorable to Gibson, his car was stopped because of a pattern and practice of racial profiling, not because police had reasonable suspicion to believe a crime was being committed." Op. of Fuentes, J. at 9. The record is incomplete at this point and the question of whether Gibson's car was stopped for racially motivated reasons is completely distinct from the question of whether the police had probable cause for the stop. *Whren v. United States*, 517 U.S. 806, 813 (1996). The constitutional reasonableness of a traffic stop does not depend on the intent of the officers involved and therefore, the officers' racially discriminatory motivations cannot invalidate an objectively reasonable stop. *Id.* As long as the officers had probable cause for believing that a traffic violation occurred, the stop was reasonable. *Id.* at 810.

Furthermore, this issue appears to have been already litigated at the state court level. "State courts unquestionably have power to render preclusive judgments regarding the Fourth Amendment's prohibition of unreasonable searches and seizures." *Linnen v. Armainis*, 991 F.2d 1102, 1108 (3d Cir. 1993). Indeed, even if the state court was wrong in its determination on those Fourth Amendment issues, Gibson is still precluded from relitigating the issue. 18 C. Wright, A. Miller, & E. Cooper, Jurisdiction and Related Matters § 4416.

violation of the Equal Protection Clause of the Fourteenth Amendment.[14] This requires a wholly different analysis.

Relying on *Whren v. United States*, 517 U.S. 806 (1996), the District Court reasoned that Gibson's claim for selective enforcement is not subject to the *Heck* deferred accrual rule because success on this claim would not necessarily have called into question his conviction. In *Whren*, 517 U.S. at 813, the Supreme Court held that police can temporarily detain a motorist when they have probable cause to believe that he violated a traffic ordinance, even if the police have some other motivation to stop the motorist. However, the Court in *Whren* expressly limited its analysis to the Fourth Amendment, and acknowledged that "the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment" *Id.*

As we explained in *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3d Cir. 2002), "[t]he fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for enforcement of a law. Plaintiffs' equal protection claims under the Fourteenth Amendment require a wholly separate analysis from their claims under the Fourth Amendment." (internal citations omitted.)

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[14] Section One of the Fourteenth Amendment states in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

Whren and *Carrasca* stand for the proposition that, even though the Fourth Amendment reasonableness standard is not influenced by the subjective intentions of the person making the search or seizure, if a person can demonstrate that he was subjected to selective enforcement in violation of his *Equal Protection* rights, his conviction will be invalid.[15] *United States v. Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973) ("[A]ny 'systematic discrimination' in enforcement . . ., or 'unjust and illegal discrimination between persons in similar circumstances,' . . violates the equal protection clause and renders the prosecution invalid."). Because a successful claim of selective enforcement under the Fourteenth Amendment Equal Protection Clause would have necessarily invalidated Gibson's conviction, under the *Heck* deferred accrual rule the statute of limitations did not begin to run until his sentence was vacated and this claim is not untimely. *See Kramer v. Village of North Fond du Lac*, 384 F.3d 856, 862 (7th Cir. 2004) (recognizing that the *Heck* deferred accrual rule applies to Fourteenth Amendment equal protection claims); *Portley-El v. Brill*, 288 F.3d 1063, 1067 (8th Cir. 2002) (stating that an equal protection claim is a direct attack on the validity of a disciplinary decision).

It appears that defendants do not raise a qualified immunity defense to Gibson's Fourteenth Amendment claims. Furthermore, it has long been a well-settled principle that the state may not selectively enforce the law against racial minorities. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886);

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[15] The Appellees miss the point of Gibson's argument in their suggestion that success on a selective enforcement claim would only imply the invalidity of prosecutions for traffic violations. (Appellee Brief at 31.) Gibson's allegations are that the racial profiling was part of an invidious system of discriminatory law enforcement which selectively targeted minorities for drug crimes. The traffic stops were only a vehicle for those efforts.

Berrigan, 482 F.2d at 174 (3d Cir. 1973). Thus, even assuming, arguendo, that defendants raised the issue, we deny Troopers Pennypacker and Reilly qualified immunity with regard to Gibson's Fourteenth Amendment Equal Protection claim, and this claim may proceed.

C. *Denial of Access to the Courts*

Gibson's denial of access to the courts claims in Count One are also brought under 42 U.S.C. § 1983, and therefore we must again identify the constitutional deprivation and the impermissible state action implicated in these claims. 42 U.S.C. § 1983; *Basista*, 340 F.2d at 79. The Supreme Court has recognized that a constitutional right to effectively use the courts has been found in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. See *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). Asserting this right, wherever it is grounded, a plaintiff can seek relief for "loss or inadequate settlement of a meritorious case, . . . the loss of an opportunity to sue, . . . or the loss of an opportunity to seek some particular order of relief." *Id.* at 414.

Denial of access claims generally fall into two categories. *Id.* at 412-13. The first type of claim alleges that some official action is currently preventing the plaintiff from filing a suit at the present time. *Id.* at 413. The object of such a claim is to remove the barrier so that the plaintiff can pursue the separate claim for relief. *Id.* In these cases, the constitutional deprivation is demonstrated by the very fact that the plaintiff cannot presently pursue his underlying case until the frustrating condition is removed.

In the second category of cases, the plaintiff looks backward and alleges that some past wrongful conduct influenced a litigation opportunity such that the litigation

"ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." *Id.* at 414 (footnotes omitted). In these cases, because the action was never pursued, it is often not as clear that the defendant's wrongful conduct prevented the plaintiff from pursuing or defending a claim, or that he is still foreclosed from accessing the courts. Therefore, "the underlying cause of action, whether anticipated or lost, is an element that must be described in the Complaint, just as much as allegations must describe the official acts frustrating the litigation. It follows, too, that when the access claim (like this one) looks backward, the Complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." *Id.* at 415. When a denial of access claim involves a state's suppression of evidence that is material to a criminal trial, the claim does not accrue until the conviction is invalidated. *See Smith v. Holtz*, 87 F.3d 108, 112 (3d. Cir. 1996). The parties both agree that this case implicates only "backward-looking" types of claims. (Appellant Brief at 27-28; Appellee Brief at 36.)

Gibson's "backward-looking" denial of access claims are based on two separate alleged litigation opportunities. The first was Gibson's criminal trial in which he claims he was unable to mount an effective defense because the Troopers did not disclose exculpatory information. The second involves his inability to pursue effective post-conviction relief actions that would have ended his incarceration at an earlier date because the Attorney General defendants did not disclose exculpatory evidence. We address each in turn.

1. The Criminal Conviction

Gibson argues that Troopers Pennypacker and Reilly violated his rights by suppressing exculpatory evidence related to his conviction. (Appellant Brief at 11.) Gibson attempts to

base his denial of access claim on the disclosure requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The prosecutor's duty to disclose extends beyond the information that he or she possesses, to include information in the hands of police investigators working on the case. *Kyles v. Whitley*, 514 U.S. 419, 421-22 (1995). According to Gibson, because the defendants failed to disclose exculpatory material evidence to the prosecutor or the defendant, they violated the mandate of *Brady*, and can be held liable under § 1983.

Gibson's approach is somewhat flawed because the *Brady* duty to disclose exculpatory evidence to the defendant applies only to a prosecutor. "The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *United States v. Bagley* 473 U.S. 667, 675 (1985) (footnote omitted). As the Supreme Court made clear, a prosecutor plays a special role within the adversarial process:

> Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Strickler v. Greene, 527 U.S. 263, 281 (1999). This "special status" underpins the *Brady* rule and explains why the duty of disclosure rests squarely on the shoulders of the prosecutor. *Id.*

A prosecutor is the "architect" of the criminal proceeding and must "comport with standards of justice" when acting on behalf of the state. *Brady*, 373 U.S. at 88. The prosecutor has a responsibility not just to disclose what he or she knows, but to learn of favorable evidence known to others acting on the government's behalf, weigh the materiality of all favorable evidence and disclose such evidence when it is reasonably probable that it will affect the result of the proceedings. *Kyles*, 514 U.S. at 437. The police are not equipped to perform this role and, accordingly, the Court has refused to "substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Id.* at 438.

However, Gibson also alleges that the defendants failed to inform the prosecutor of the exculpatory information. (Appellant Brief at 11.) Several circuits have recognized that police officers and other state actors may be liable under § 1983 for failing to disclose exculpatory information to the prosecutor. *McMillian v. Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996), amended 101 F.3d 1363 (11th Cir. 1996); *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988). We agree.

Although *Brady* places the ultimate duty of disclosure on the prosecutor, it would be anomalous to say that police officers are not liable when they affirmatively conceal material evidence from the prosecutor. In this case, Gibson alleges that the Troopers suppressed the extent of their impermissible law enforcement tactics, and had that information been available, he would have been able to impeach several witnesses and possibly could have halted the entire prosecution. We think that

Gibson states an actionable § 1983 claim against the Troopers for interference with his Fourteenth Amendment due process rights.

However, we also realize that this duty on the part of the Troopers was not clearly established at the time of Gibson's prosecution in 1994. As this Court explained:

> Where a challenged police action presents a legal question that is "unusual and largely heretofore undiscussed," *Id.* at 429, or where there is "at least some significant authority" that lends support of the police action, *Leveto*, 258 F.3d at 166, we have upheld qualified immunity even while deciding that the action in question violates the Constitution. On the other hand, the plaintiff need not show that there is a prior decision that is factually identical to the case at hand in order to establish that a right was clearly established.

Doe v. Groody, 361 F.3d 232, 243 (3d Cir. 2004)

Although this Court held in *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991), that evidence in the hands of the police could be imputed to the prosecutor, the Supreme Court did not settle this matter until 1995 when it decided *Kyles v. Whitley*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). More importantly, the related duty of the police to disclose information to the prosecutor was not widely addressed until later. Even in 2000, this Court was only able to *assume* that police officers "have an affirmative duty to disclose exculpatory evidence to an accused if only by informing the prosecutor that the evidence exists." *Smith v.*

Holtz, 210 F.3d 186, 197 n.14 (3d Cir. 2000).[16] Because such a right was not clearly established in this Circuit at the time of Gibson's conviction, Troopers Pennypacker and Reilly are entitled to qualified immunity with regard to their failure to inform the prosecutor of *Brady* material.

2. Civil Claims and Post-Conviction Relief

Gibson also alleges that the Attorney General defendants "failed to disclose exculpatory material to [Gibson] during the course of his incarceration and post-conviction criminal proceedings in the New Jersey courts and that their suppression of materials relating to racial profiling practices on the New Jersey Turnpike violated plaintiff's right of access to the courts" because Gibson was prevented from effectively pursuing post-conviction relief or a civil action before the full disclosure of the nature of the racial profiling was revealed in 2000. (Appellant Brief at 26.) We address the purportedly lost civil claims and the lost post-conviction relief claims separately.

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[16] In *Smith v. Holtz*, 210 F.3d 186, 197 n.14 (3d Cir. 2000), this Court was faced with a similar question as the one before us. Avoiding the question of whether investigating police officers have an affirmative duty to disclose exculpatory evidence, this Court noted:

> Although the affirmative duty to disclose is placed upon the prosecutor, we will nonetheless assume for the purposes of this appeal that investigating police officers also have an affirmative duty to disclose exculpatory evidence to an accused if only by informing the prosecutor that the evidence exists. But see *Kelly v. Curtis*, 21 F.3d 1544, 1552 (11th Cir. 1994). We will further assume that a § 1983 claim alleging a due process violation under *Brady* can, therefore, be asserted against police officers. See *McMillian v. Johnson*, 88 F.3d 1554, 1567 n. 12 (11th Cir. 1996), amended, 101 F.3d 1363 (11th Cir. 1996).

Smith, 210 F.3d at 197 n.14.

Gibson failed to adequately describe the civil litigation opportunities that he claims he lost. "Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the Complaint sufficient to give fair notice to a defendant." *Christopher*, 536 U.S. at 416 (internal citations omitted). Because Gibson's inadequate allegations do not allow us to decide whether his lost claims were ever available or still are available, we will uphold the dismissal of this part of his claim.

Gibson also claims that the defendants frustrated his efforts to obtain post-conviction relief that would have ended his incarceration at an earlier date. In his brief, he relies heavily on *Brady*, seeking to imply a duty on the defendants to come forward with exculpatory evidence even after his conviction and appeal. However, Gibson has pointed to no constitutional duty to disclose potentially exculpatory evidence to a convicted criminal after the criminal proceedings have concluded and we decline to conclude that such a duty exists. We also note that the actual prosecutors in Gibson's case are not named as defendants, and would have been immune if they had been so named. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

Without a duty to act, the defendants cannot be liable for failing to come forward with the exculpatory evidence. However, Gibson's Complaint as it relates to the Attorney General defendants does not simply allege that the defendants failed to come forward with exculpatory evidence, but that their actions obfuscated the real extent of racial profiling. "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *West v. Atkins*, 487 U.S. 42, 49-50 (1988). Whether or not the Attorney General defendants had a duty under *Brady* is irrelevant to the question of whether they used their positions to perpetuate the discriminatory enforcement of laws and to

obstruct those convicted as a result of the discriminatory enforcement from obtaining relief.

Gibson specifically alleges that, although the Attorney General defendants published the *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* in April 1999, the authors nevertheless "intentionally withheld and suppressed the overwhelming evidence they had gathered showing that profiling was an entrenched agency wide policy in the NJSP." (Appellant App. at A-85.) According to Gibson, the suppression of this evidence denied him the opportunity to obtain freedom for a number of years.

Although the complete information disclosed in 2000 which eventually led to Gibson's release would have been helpful earlier, we cannot say that the defendants *deprived* Gibson of his access to the courts. Although we recognize that there is generally no "state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right" in a § 1983 suit, *Daniels v. Williams*, 474 U.S. 327, 330 (1986), we adhere to the Supreme Court's teaching that not all acts are unconstitutional simply because of the result, *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (requiring proof of an invidious discrimination purpose for a claim of racial discrimination under the equal protection clause). In *Estate of Smith v. Marasco*, 318 F.3d 497, 511 (3d Cir. 2003), we expressed our approval of the Sixth Circuit view that a denial of access claim is available where the state officials "*wrongfully and intentionally* conceal information crucial to a person's ability to obtain redress through the courts, and do so *for the purpose of frustrating that right*, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled." (quoting *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262-63 (6th Cir. 1997)) (emphasis added).

Gibson alleged no facts that would establish that the actions of the Attorney General defendants in publishing the 1999 *Interim Report* were directed at denying relief to people like Gibson.[17] The fact that the Attorney General defendants' actions had the unfortunate result of perpetuating his incarceration until 2000 is insufficient under the circumstances to establish a cause of action. Consequently, Gibson's claim against the Attorney General defendants was properly dismissed.

D. *The Failure to Train Claim*

Gibson alleges in Count One that the NJTA had notice of the NJSP's practice of racial profiling, tolerated the practice, failed to properly discipline, restrict or control employees, failed to take adequate precautions in hiring personnel, and intentionally suppressed known evidence of racial profiling that would have benefitted Gibson if brought during his prosecution or afterward. The District Court dismissed these claims noting that the action was time-barred and no facts were alleged to support these claims. Although Gibson challenges the Court's determination that no facts were alleged to support this claim, he fails to challenge the determination that the action is time-barred and we deem the issue waived. *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 88 (3d Cir. 1987). Accordingly, we affirm the dismissal of the claims against the NJTA.

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[17] In his Reply Brief, Gibson points to only one allegation in his Complaint (¶ 61) that the defendants were acting purposefully when they "actively suppressed information that would have required either (1) Plaintiff's release from prison, or (2) a new trial based on the exculpatory information described herein and the misconduct of the State for suppressing same, as stated in *Brady v. Maryland* and similar state law." (Appellant Reply Brief at 14.) However, we read this paragraph as just a summary of Gibson's allegations that the government suppressed information and that the information would have been helpful. The allegation makes no claim that the government suppressed information in order to stifle Gibson's rights.

IV. CONCLUSION

Consistent with this Opinion and the Opinion of Judge Fuentes, Gibson's claims in Count One under 42 U.S.C. § 1983 that the Troopers violated his Fourth Amendment rights, and unconstitutionally subjected him to selective enforcement of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment may proceed. Since these claims in Count One may proceed, it follows that the 42 U.S.C. § 1983 conspiracy claim in Count Three and the 42 U.S.C. § 1985 conspiracy claim in Count Four may also proceed against Troopers Reilly and Pennypacker. We will also reinstate the state law claims. The dismissal of all the remaining claims is affirmed.

FUENTES, *Circuit Judge*, with whom BARRY, *Circuit Judge*, joins, writes the opinion of the Court with respect to Part III.A, from which Judge Van Antwerpen dissents. Judge Van Antwerpen writes the opinion of the Court with respect to Parts I, II, III.B-D, and IV.

We depart from our colleague's well-reasoned dissent with respect to Gibson's Fourth Amendment claims. Gibson claims that the Defendants violated his Fourth Amendment rights, when, as a consequence of racial profiling, he was stopped, searched, and arrested without probable cause (henceforth referred to as "Fourth Amendment claims"). We are asked to determine whether the statute of limitations began to run on Gibson's § 1983 complaint as to these claims when he was arrested in 1992, or when his conviction was overturned in 2002. We conclude that, under *Heck v. Humphrey*, 512 U.S. 477 (1994), the statute of limitations did not begin to run until 2002. Accordingly, Gibson's § 1983 complaint was timely filed in 2002, notwithstanding the fact that he was stopped, searched, and detained in 1992. We thus reverse the District Court's dismissal of Gibson's Fourth Amendment claims.

III. A. 1. Background Relating to Fourth Amendment Claims

As noted by our colleague in dissent, Gibson was a passenger in the rear seat of an automobile that was stopped on the New Jersey Turnpike in October 1992 by two New Jersey State Troopers.[18] In a search of the car, the Defendant Troopers discovered drugs in the hatchback. Gibson was arrested and charged with various drug-related offenses. He was tried and convicted in April 1994. Five years after his conviction, and while serving his prison sentence, Gibson filed a petition for post-conviction relief in the New Jersey Superior Court,

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[18] Hereafter referred to as Gibson's car.

requesting discovery materials pertaining to racial profiling. His petition was denied, in part, because he did not present sufficient evidence to support the racial profiling claim and/or the probable illegality of his stop and arrest. In 1999, the New Jersey Attorney General issued an interim report regarding allegations of racial profiling. Additionally, in November 2000, new evidence regarding racial profiling practices in New Jersey was released in response to the various racial profiling challenges that were being raised at that time. Eventually, in April 2002, the New Jersey Attorney General filed a formal motion to vacate the convictions in 86 cases, including Gibson's case. The State determined that the defendants in these cases could make out a colorable claim of racial profiling. Based on the State's motion, Gibson's conviction was vacated, and all charges against him were dismissed. Gibson alleges that his conviction was overturned because the 1992 stop resulted from unlawful racial profiling and the practice of racial profiling by the state police had not been disclosed to him.

On November 14, 2002, more than ten years after his arrest, Gibson filed a § 1983 complaint claiming, as relevant here, a violation of his right to be free from unlawful search and seizure under the Fourth Amendment.

2. Discussion

In *Heck*, the Supreme Court held that to maintain a claim for damages for an "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, [or] declared invalid by a state tribunal." 512 U.S. at 486-87.

Under *Heck*, § 1983 claims for damages attributable to an unconstitutional conviction or sentence do not accrue until the conviction or sentence has been invalidated. *Id.* at 489-90. The

Supreme Court directs district courts to determine in each case whether a particular § 1983 claim is deferred under *Heck*, *Id.* at 487 (requiring district courts to "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence"). The Court offered guidance on the question of when a § 1983 claim implies the invalidity of a conviction or a sentence, and is thus deferred, in two separate footnotes in *Heck*. In footnote six, the Court provided an example of when a defendant's § 1983 action would implicate the validity of his conviction. In the example, a person is convicted and sentenced for resisting arrest, an offense ordinarily requiring proof that the defendant intentionally prevented an officer from making a *lawful* arrest. The defendant then brings a § 1983 action for damages against the officer claiming the officer arrested him in violation of his Fourth Amendment right to be free from unreasonable seizures. Because this § 1983 claim would "negate an element of the offense of which he has been convicted," *Id.* at 486 n.6, it does not accrue until the conviction or sentence has been invalidated.

In footnote seven, the Court offered an example of a § 1983 action which, even if successful, would *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, and thus, is not subject to deferral. The Court explained that a § 1983 action for damages based on an allegedly unreasonable search would not necessarily imply the invalidity of the conviction because of doctrines such as independent source, inevitable discovery, and harmless error. *Id.* at 487 n.7. The Court noted that in order for a § 1983 plaintiff to recover compensatory damages, he or she must prove both that the search was unlawful and that it caused actual compensable injury that "does not encompass the 'injury' of being convicted and imprisoned." *Id.* (emphasis in original). The Court emphasized however, that once a

conviction was overturned, being convicted and imprisoned would qualify as an actionable § 1983 injury. *Id.*

Our decision in this case rests largely upon how we interpret footnote seven. At one point, there were two dominant approaches to the question of whether Fourth Amendment claims are subject to the *Heck* deferral rule. *E.g., Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (noting that "[t]here is a split in the circuits as to how Heck's footnote seven should be interpreted."); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 395 (6th Cir. 1999). Some courts had interpreted footnote seven as categorically excluding Fourth Amendment claims from the *Heck* deferred accrual rule. Under this approach, Fourth Amendment claims for unreasonable searches are not deferred under *Heck*. *See, e.g., Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) (holding that claims for false arrest and imprisonment under § 1983 accrue at the time of the arrest);[19] *Copus v. City of Edgerton*, 151 F.3d 646, 648 (7th Cir. 1998) (Fourth Amendment claims for unlawful searches or arrests can go forward because they do not necessarily imply a conviction is invalid); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (extending the categorical interpretation of footnote seven in the Fourth Amendment context "to Fifth Amendment claims challenging the voluntariness of confessions"); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (*Heck* does not defer a § 1983 claim because, even if a search was unconstitutional, the conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error).

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[19] It is significant to note, however, that the *McSweeney* Court acknowledged that "there may be rare and exotic circumstances in which a § 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." *McSweeney*, F.3d at 53 n.4.

In contrast, the majority of Courts of Appeals have read footnote seven as requiring a fact-based inquiry into whether a Fourth Amendment claim implies the invalidity of the underlying conviction. Under the fact-based approach, Fourth Amendment claims can be brought under § 1983, even without favorable termination, if the district court determines that success on the § 1983 claim would not necessarily imply the invalidity of the conviction. *See, e.g., Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco, and Firearms,* 401 F.3d 419 (6th Cir. 2005) (conducting a fact-based inquiry as to whether the alleged Fourth Amendment injuries would necessarily imply the invalidity of the conviction); *Hughes v. Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003) (same); *Gauger v. Hendle*, 349 F.3d 354, 361-62 (7th Cir. 2003) (same); *Covington v. City of New York*, 171 F.3d 117, 123 (2d Cir. 1999) (same); *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125 (10th Cir. 1999) (same); *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (same); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 182-83 (4th Cir. 1996) (same). In situations where the evidence seized as a result of an unlawful search or arrest was used to convict the defendant, district courts examine the factual circumstances to determine whether doctrines such as independent source, inevitable discovery, or harmless error would have permitted the introduction of the evidence. *See, e.g., Ballenger v. Owens*, 352 F.3d 842, 846-47 (4th Cir. 2003); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996). Where it is impossible or improbable that such doctrines would have permitted the introduction of the evidence at issue in the criminal proceedings, the courts toll the statute of limitations as to the § 1983 claims until such time as the plaintiff's criminal proceedings have been resolved in his or her favor. *See also, e.g., Baranski,* 401 F.3d at 434; *Wiley v. City of Chicago*, 361 F.3d 994, 997 (7th Cir. 2004); *Hughes*, 350 F.3d at 1161 (examining circumstances of case to determine whether § 1983

action for unlawful search necessarily implied invalidity of conviction); *Covington*, 171 F.3d at 123 (noting that tolling rule differs in cases where conviction could be obtained from independent, untainted evidence, as opposed to cases where the evidence derived solely from unlawful arrest).

We note that the general trend among the Courts of Appeals has been to employ the fact-based approach. Indeed, even those Courts of Appeals which had interpreted footnote seven as categorically excluding Fourth Amendment claims from the *Heck* deferred accrual rule have utilized a fact-based approach in some recent cases. *Compare Copus*, 151 F.3d at 648 with *Gauger*, 349 F.3d at 361 and *Wiley*, 361 F.3d at 997 (Seventh Circuit); compare *Datz v. Kilgore*, 51 F.3d at 253 n.1 with *Hughes*, 350 F.3d at 1161 (Eleventh Circuit); *compare Simmons*, 77 F.3d at 1095 with *Anderson v. Franklin County, Mo.*, 192 F.3d 1125, 1131 (8th Cir. 1999) (Eighth Circuit).

Irrespective of the general trend, in our view, the better reading of footnote seven is one that requires a fact-based inquiry. Accordingly, in those cases in which a district court determines that success on the § 1983 claim would imply the invalidity of the conviction, the cause of action is deferred until the conviction is overturned. Both the letter and spirit of *Heck* supports this conclusion. Footnote seven of *Heck* clearly states that an action *may* lie with respect to an unreasonable search, not that it *shall* or *will* lie. 512 U.S. at 487 n.7. The use of the permissive word "may" endorses the use of a fact-based approach because it precludes the automatic exemption of all Fourth Amendment claims from the Heck deferred accrual rule. *See* John S. Buford, Note, *When the Heck Does This Claim Accrue? Heck v. Humphrey's Footnote Seven and § 1983 Damages Suits for Illegal Search and Seizure*, 58 Wash. & Lee L. Rev. 1493, 1533 (2001); Paul D. Vink, Note, *The Emergence of Divergence: The Federal Courts' Struggle to Apply Heck v. Humphrey to § 1983 Claims for Illegal Searches*, 35 Ind. L.

Rev. 1085, 1106-07 (2002). Moreover, the policies cited in the *Heck* decision itself, which provide the proper context within which to interpret footnote seven, lend additional support for the case-by-case approach. In rendering its decision, the Court noted that it "has long expressed . . . concerns for finality and consistency and has generally declined to expand opportunities for collateral attack." *Heck*, 512 U.S. at 484-85. The case-by-case approach actually best honors these values by identifying all those § 1983 challenges which, if successful, would imply the invalidity of existing convictions. *See* Buford, *supra*, at 1533-34; Vink, *supra*, at 1106.

Our colleague in dissent reaches a different conclusion based on *Montgomery v. De Simone*, 159 F.3d 120 (3d Cir. 1998), which considered whether the plaintiff's false arrest and imprisonment claims accrued on the day of the arrest or on the day of favorable disposition of the conviction. Plaintiff Rosemary Montgomery was arrested in September 1992 and charged with speeding, drunk driving, and refusing to take a breathalyzer test, *Id.* at 122. She was found guilty of these charges and subsequently appealed her conviction. At a trial *de novo* in the Superior Court of New Jersey, in February 1994, she was acquitted of all charges. A year later, she filed a § 1983 suit in federal court claiming malicious prosecution, false arrest, and false imprisonment relating to the September 1992 traffic stop. The District Court entered summary judgment for the defendants, and Montgomery appealed. On appeal, we held that the two-year limitations period for the false arrest and false imprisonment claims began to run on the night of her arrest, and thus these claims were time-barred. In discussing whether her cause of action arose when she was arrested in 1992 or when she was acquitted in 1994, we reasoned as follows:

> Montgomery argues that under [*Heck*] these claims only accrued after her criminal charges were resolved in her favor. In *Heck*, the Court held that a § 1983

> claim for damages attributable to an unconstitutional conviction or sentence does not accrue until that conviction or sentence has been invalidated. *Heck*, 512 U.S. at 489-90. The Court also noted, however, that if a successful claim would not demonstrate the invalidity of any outstanding criminal judgment, it should be allowed to proceed. *Id.* at 487. Because a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest, we find that Montgomery's claims for false arrest and false imprisonment are not the type of claims contemplated by the Court in *Heck* which necessarily implicate the validity of a conviction or sentence. *See Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (stating that "it is well established that a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest."). Accordingly, we read *Heck* to be consistent with our determination that Montgomery's false arrest and false imprisonment claims accrued on the night of her arrest.

Id. at 126 n.5.

Our analysis of Gibson's claims differs from that of our colleague's because we read *Montgomery* differently. We do not dispute that, consistent with *Heck*, in some cases Fourth Amendment claims for false arrest begin to accrue at the time of arrest, not when the conviction is overturned. This occurs when a false arrest claim will not necessarily undermine a conviction or sentence. Thus, in *Montgomery*, we held that the plaintiff's false arrest claim was not deferred under *Heck* because the validity of her conviction did not depend upon probable cause for the stop. The evidence against Montgomery included the officer's testimony concerning her driving, and a radar measurement of her speed, neither of which was obtained

as a result of the unlawful stop. Moreover, Montgomery refused to take the breathalyzer test which, under New Jersey law, gave rise to one of the charges on which she was convicted. Thus, in *Montgomery*, the plaintiff's § 1983 claim did not necessarily imply the invalidity of her conviction.

While it is true that some Fourth Amendment claims are not subject to deferral under *Heck*, we conclude that *Heck* does not set forth a categorical rule that all Fourth Amendment claims accrue at the time of the violation. This Court's determination that the plaintiff's false arrest claim in Montgomery qualified as an exception to the *Heck* deferral rule, and thus accrued on the night of the arrest, does not mandate a blanket rule that all false arrest claims accrue at the time of the arrest.

Our dissenting colleague reasons that we are precluded from engaging in a fact-based inquiry as to the applicability of the *Heck* deferral rule because the *Montgomery* Court elected not to do so. We disagree with this interpretation. As we discussed above, the *Montgomery* Court considered, albeit briefly, the charges brought against Montgomery and the existing evidence supporting those charges. Based on its analysis, the Court reasoned that Montgomery's conviction could be upheld based on evidence obtained independently from the initial stop and arrest. *Montgomery* did not rule out a factual analysis of the evidence and it does not preclude us from applying the case-by-case approach here.

Our dissenting colleague criticizes the fact-based approach because it would involve district courts in "difficult questions about what might have happened in lower court criminal proceedings," (Dissenting Op. at n.10), thereby violating *Heck*'s rule against questioning the validity of underlying criminal convictions. While our colleague is correct that the fact-based approach requires a district court to inquire into the

nature of the criminal conviction and the antecedent proceedings, our approach does not in any way place the district court in the position of questioning the validity of that conviction. To the contrary, under *Heck*, a district court is required only to make a threshold determination as to whether a plaintiff's § 1983 claim, *if successful*, would have the hypothetical effect of rendering the criminal conviction or sentence invalid. If this threshold is satisfied, the district court's analysis is at an end, and the *Heck* deferred accrual rule is triggered. This approach is consistent with the dictates of *Heck*, and has been adopted by the majority of our sister circuits. *See e.g., Baranski*, 401 F.3d at 419; *Wiley*, 361 F.3d at 997; *Ballenger*, 352 F.3d at 846-47; *Hughes*, 350 F.3d at 1161; *Covington*, 171 F.3d at 122.

In this case, Gibson was arrested for drug-related offenses after his car was stopped and searched in October 1992. His conviction was overturned in April 2002. Gibson's primary claims are that he was falsely arrested and falsely imprisoned in violation of the Fourth and Fourteenth Amendments.

Under New Jersey law, "[f]alse arrest or false imprisonment is the constraint of the person without legal justification." *Fleming v. United Parcel Serv., Inc.*, 604 A.2d 657, 680 (N.J. Super. Ct. Law Div. 1992), *aff'd per curiam*, 642 A.2d 1029 (N.J. Super. Ct. App. Div. 1994) (citing *Pine v. Okzewski*, 170 A. 825, 826 (N.J. 1934)). The tort of false arrest consists of: (1) an arrest or detention of the person against his will; (2) which is done without proper legal authority or legal justification. *See Id.* If a judgment for Gibson on his false arrest claim "would necessarily imply the invalidity of his conviction," Gibson would be barred from bringing his cause of action until his conviction was overturned in April of 2002. *Heck* 512 at 487. To prevail on his § 1983 claim for false arrest and imprisonment, Gibson would have to demonstrate that his arrest was without legal justification.

Viewing the evidence in the light most favorable to Gibson, his car was stopped because of a pattern and practice of racial profiling, not because police had reasonable suspicion to believe a crime was being committed. Generally, the absence of reasonable suspicion renders a stop unlawful, *see Alabama v. White*, 496 U.S. 325, 329-30 (1990), and evidence obtained from that unlawful stop excludable, *see Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Gibson was arrested when the Defendant Troopers discovered drugs during the subsequent search of the car. These drugs were the only evidence supporting the drug charges against Gibson. Thus, success on his § 1983 claim for false arrest would "necessarily imply" that he was improperly convicted. As other courts have recognized, situations such as Gibson's – where the only evidence supporting the conviction is tainted by a possible constitutional violation that is the subject of a § 1983 action – are perhaps the quintessential example of when the *Heck* deferred accrual rule is triggered. *E.g.*, *Covington*, 171 F.3d at 123 ("On the other hand, in a case where the *only* evidence for conviction was obtained pursuant to an arrest, recovery in a civil case based on false arrest would necessarily impugn any conviction resulting from the use of that evidence.") (emphasis in original).[20] Gibson is not seeking damages for physical injury, injury to reputation or seizure of property resulting from the improper

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[20] In dissent, our colleague states that even under a fact-based approach, he still could not conclude that the exclusion of the evidence in this matter would necessarily have invalidated Gibson's underlying state criminal conviction. (Dissenting Op. at n.10) ("We cannot say what other evidence of guilt may have been present or whether there may have been a valid reason for stopping the vehicle other than race."). But the record belies that concern, as it is clear that the *only* evidence supporting the criminal conviction was obtained as a result of the unlawful stop based on racial profiling and there is nothing in the record indicating that an exception to the exclusionary rule would apply. Indeed, counsel for the defendants conceded as much during the oral arguments before us.

search. His alleged injury was based on evidence derived from an improper stop. In other words, his actual, compensable injury was "the 'injury' of being convicted and imprisoned," which was not actionable until the conviction was overturned. *Heck*, 512 U.S. at 487 n.7.

Therefore, under *Heck*, Gibson's Fourth Amendment claims were not cognizable and did not accrue until his conviction was invalidated in April 2002. Thus, these claims, when filed in November 2002, were raised well within the two-year statute of limitations.[21] We thus reverse with respect to this issue.

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[21] As an aside, even if Gibson's claim had accrued in 1992, his cause of action may also be subject to tolling under New Jersey law on equitable grounds. A New Jersey State Court had already determined in 1994 that he did not have sufficient evidence to support a claim of racial profiling. Sufficient evidence came when the New Jersey Attorney General proposed dismissal of 86 cases tainted by racial profiling. We need not decide this issue, however, as Gibson's case comes within the scope of *Heck*'s deferral rule. *Id.* at 489-90.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1847

EMORY E. GIBSON, JR.

Appellant

v.

SUPERINTENDENT OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY-DIVISION OF STATE POLICE; NEW JERSEY TURNPIKE AUTHORITY; SEAN REILLY; J.W. PENNYPACKER; PETER VERNIERO; RONALD SUSSWEIN; JOHN FAHY; GEORGE ROVER; JOHN DOES 1-10; TREASURER STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 02-cv-05470)
District Judge: Honorable Robert B. Kugler

Argued February 11, 2005

Before: BARRY, FUENTES, and VAN ANTWERPEN,
Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and argued

on February 11, 2005, on consideration whereof, it is now hereby

ORDERED and ADJUDGED that the judgment of the District Court dated February 24, 2004, is hereby AFFIRMED in part and REVERSED in part and REMANDED to the District Court for further proceedings consistent with this Court's opinion. Each party to bear their own costs.

All of the above in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia Waldron
Clerk

DATED: June 14, 2005

Certified as a true copy and issued in lieu of a formal mandate on 8/26/05

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the
Third Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

Civil No. 02-5470 (RBK)

ORIGINAL FILED
DECEMBER 12, 2003
WILLIAM T. WALSH, CLERK

EMORY E. GIBSON, JR.,

Plaintiff,

v.

SUPERINTENDENT OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY – DIVISION OF STATE POLICE; NEW JERSEY TURNPIKE AUTHORITY; SEAN REILLY; J.W. PENNYPACKER; PETER VERNIERO; RONALD SUSSWEIN; JOHN FAHY; GEORGE ROVER; TREASURER OF STATE OF NEW JERSEY; JOHN DOES 1-10,

Defendants.

OPINION

KUGLER, United States District Judge:

Plaintiff Emory E. Gibson, Jr. brought this action pursuant to 42 U.S.C. §§1983 and 1985 claiming violations of his constitutional rights under Article IV and the First, Fifth, Sixth and Fourteenth Amendments. Defendants move to dismiss the complaint on several grounds. This Court concludes that

Gibson's constitutional claims for selective enforcement and failure to train (as well as any claims that reasonably can be construed to plead violations of the Fourth Amendment and malicious prosecution) are time-barred, but that Gibson's constitutional claim for denial of access to the courts is *not time-barred*. The Court seeks further and more specific briefing on this claim, however. Accordingly, the motion of Defendants Trooper J.W. Pennypacker; Trooper Sean Reilly; the Superintendent, New Jersey Department of Law and Public Safety, Division of State Police; the Treasurer, State of New Jersey, Treasury Department; former New Jersey Attorney General Peter Verniero; and Deputy Attorneys General Ronald Susswein, John Fahy, and George Rover will be granted in part, and denied in part, as discussed below.[1] The accompanying Order provides dates for submission of new motions to dismiss and a date for oral argument.

I. *FACTUAL BACKGROUND*

A. *Gibson's Arrest*

The facts are taken as true from the allegations in the complaint. In the early morning of October 28, 1992, two New Jersey State Troopers, Defendant J.W. Pennypacker and Defendant Sean Reilly, stopped a car that was traveling on the New Jersey Turnpike. Plaintiff Emory Gibson was in the back seat of the car, and two other men were in the front seat. All three occupants of the car were African American. The state

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[1] Defendant New Jersey Turnpike Authority did not file a formal motion to dismiss, but instead joined in certain parts of the State Defendants' motion by letter dated June 4, 2003. Because no motion was formally filed, there is no need to grant or deny the New Jersey Turnpike Authority's request for relief, but the Authority is subject to the same deadlines for filing new motions, as set forth in the accompanying Order, as the other defendants.

troopers searched the car and arrested the men for possession of drugs.

Gibson alleges that the troopers had no reasonable suspicion or probable cause to stop the car, to search the car, or to arrest Gibson.

On April 21, 1994, Gibson was convicted of two counts of drug offenses in the Superior Court of New Jersey, Salem County, and sentenced to fifty years in prison.

B. ***Growing Awareness of Practice of Racial Profiling***

During a time period running approximately ten years, beginning several years prior to Gibson's arrest and extending several years after his conviction, a growing public awareness developed of racially discriminatory practices of the New Jersey State Police, specifically with respect to automobile stops along the New Jersey Turnpike, commonly known as racial profiling. Even before racial profiling along the highways of New Jersey came into public focus, the United States Department of Justice initiated lawsuits in the 1970's against the New Jersey State Police claiming that the department engaged in racial discrimination in its employment practices.

A television program shown in 1989 featured complaints and statistical data regarding a disproportionate number of African American motorists being stopped and detained, although often not arrested, along the Turnpike by New Jersey State Troopers. The New Jersey State Police Superintendent at that time responded to the television program in a videotaped message, in which he supported the practices of the New Jersey State Troopers and refused to gather data necessary to verify the allegations of racial profiling.

In March 1996, a New Jersey trial court in the criminal case of *State of New Jersey v. Soto*, 324 N.J. Super. 66, 734

A.2d 350 (Law Div. 1996), suppressed evidence in the cases of seventeen African American defendants who alleged that their arrests on a southern portion of the New Jersey Turnpike between 1988 and 1991 were the result of racially discriminatory enforcement of the traffic laws by the New Jersey State Police. Based on statistical data compiled by the parties and testimony from several officers, the *Soto* court found that the defendants had demonstrated that the police had an institutional policy of racial profiling for stops along the pertinent portion of the Turnpike and that the State Police hierarchy had failed to monitor and control roadside stops and to investigate the many claims of discrimination, all of which had resulted in violations of the seventeen criminal defendants' Fourteenth Amendment rights to equal protection and due process and warranted suppression of evidence seized pursuant to the roadside stops. The *Soto* decision received a large amount of media and legal attention in New Jersey.

The State of New Jersey, through its Attorney General, appealed the *Soto* decision, arguing that the statistical evidence that minorities were stopped more often than Caucasians was supported by the proposition that minorities are worse drivers than Caucasians. Gibson maintains that this argument was "repugnant," inconsistent with the trial testimony, and is another example exhibiting the State defendants' deliberate indifference to the unconstitutional practice of racial profiling.[2]

New Jersey State Troopers themselves, both current and former, filed lawsuits alleging specific incidents of racial and

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[2] Although there is no indication in these pleadings of the outcome of the appeal of the *Soto* decision, the Honorable Joel A. Pisano noted in an opinion on a similar case that after the high profile Turnpike shooting of four young men on April 22, 1999, Attorney General Verniero withdrew the *Soto* appeal and admitted that the practice of racial profiling was real. *See White v. Williams*, 179 F. Supp.2d 405, 411-12 (D.N.J. 2002).

ethnic discrimination, as well as a pervasive and condoned atmosphere of discrimination, including racial profiling on the highways and other roads of New Jersey. These lawsuits include those filed by New Jersey State Troopers Vincent Bellaran and Emblez Longoria. In Bellaran's case, which was heard in a non-jury trial in March of 1998 before the Honorable Mary L. Cooper, United States District Judge for the District of New Jersey, the court found that racial discrimination was pervasive within the New Jersey State Police and that Bellaran had been asked by supervisors to target African American motorists.

Newspapers continued to report in 1997 on the statistical data showing that minority drivers were disproportionately targeted for traffic stops. On February 28, 1999, then Superintendent of the New Jersey State Police, Carl Williams, publicly condoned the practice of racial profiling and maintained that there was a link between particular racial and ethnic groups and particular drug trafficking.

C. *New Jersey's Response to Allegations of Racial Profiling*

Gibson alleges that the New Jersey State Police, and the New Jersey Attorney General's Office, not only failed to properly train, supervise and monitor officers with respect to race-based automobile stops, but they condoned and encouraged the practice of racial profiling. Officer training included representations that black people of African American, Jamaican and Nigerian backgrounds, and Hispanic people with lineage to several Latin American countries, were most likely to be transporting drugs through New Jersey. These representations were emphasized through the use of sensationalized video and movie clips depicting members of these racial minorities engaging in drug trafficking. Awards were given to police officers who made the most arrests.

Further, Gibson alleges that the New Jersey Attorney General's Office made half-hearted and misleading attempts to respond to the growing awareness of the practice of racial profiling within the New Jersey State Police and deliberately withheld data and information that showed the pervasiveness of the practice and how the New Jersey State Police hierarchy condoned racial profiling. In December 1996, Defendant Peter Verniero, who was then the Attorney General of New Jersey (and is now a Justice of the New Jersey Supreme Court), began examining the existing evidence of racial profiling in response to inquiries by the United States Department of Justice, which apparently was investigating the practice of racial profiling in New Jersey. Verniero engaged Defendants Ronald Susswein, John Fahy and George Rover, Deputy Attorneys General for the State of New Jersey, to aid in the task. Gibson sues these four Attorney General defendants in their individual capacities.

At that time, Defendants Verniero, Susswein, Fahy and Rover knew that racial profiling within the New Jersey State Police existed. Defendant Susswein previously had advocated some form of racial profiling through a memorandum circulated through the Office of the Attorney General. In responding to the Department of Justice inquiries, these defendants deliberately withheld extensive information which they knew demonstrated, or tended to demonstrate, the existence of racial profiling within the New Jersey State Police.

On April 20, 1999, Defendant Verniero published a report entitled the *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* [hereinafter the "*Interim Report*"]. The primary authors of the *Interim Report* allegedly were Defendants Verniero and Susswein. The report conceded that the practice of racial profiling was real, but Verniero and Susswein placed the blame on a small number of individual troopers rather than acknowledging that racial profiling was an entrenched institutional policy that the

defendants knew of and encouraged. Evidence showing the defendants' knowledge and encouragement of the agency-wide practice of racial profiling was deliberately withheld by Defendants Verniero and Susswein. Gibson claims that the issuance of this misleading report allowed the defendants to maintain that they were diligently responding to allegations of racial profiling, but the report did not provide any benefit to Gibson in seeking to apply to the courts to end his imprisonment.

Gibson alleges that all of these events cumulatively establish "that numerous facets of NJSP training, custom, procedures, protocols and culture constituted and/or contributed to a climate within the NJSP supportive of racial hostility, prejudice and profiling, which emphasized minorities as suspects who should be subject to stop, search and arrest." (Compl., ¶41). Despite repeated and continuous notice that New Jersey State Troopers on the Turnpike were engaging in a practice of unlawful and unconstitutional stops of minority drivers, the defendants did nothing to prevent this practice from continuing.

Gibson sues the New Jersey Turnpike Authority [hereinafter "NJTA"] because it contracts with the New Jersey State Police to provide services on the Turnpike to patrol and police public highways, and it "remains responsible for the safety of travelers lawfully on its property including, but not limited to, the law enforcement operations, policies and practices that occur thereon." (Compl., ¶7). The NJTA "and its officials, officers, servants and employees, failed to take adequate steps to prevent troopers from posing a danger to the well-being and to the constitutional rights of minority motorists on the Turnpike." (Compl., ¶44).

D. *Gibson's Prosecution*

Gibson's criminal trial went forward on April 20 and 21, 1994. He claims that in violation of the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and similar state laws, the prosecution did not disclose information in its possession that related to the New Jersey State Police's practice of racial profiling. That information, "which would have shown in all probability that the stop was a product of racial profiling and that Plaintiff was not guilty," was deliberately suppressed by Defendants "NJTA, the individually named Defendants and the NJSP hierarchy." (Compl., ¶54).

At Gibson's trial, the prosecution relied on the testimony of Defendants Reilly and Pennypacker, along with the testimony of a prosecution expert on drug interdiction and valuation, Dennis Tulley. Gibson claims that Defendants Verniero and Fahy were aware of information about Tulley that would have been exculpatory in Gibson's trial—specifically, that Tulley had "a monthly African American arrest rate on the Turnpike" as evidenced by a study of some troopers' behavior that was compiled for the *Soto* matter. (Compl., ¶57).

Five years after his conviction, on February 18, 1999, Gibson filed a motion for post-conviction relief, challenging the denial of his motion to suppress and requesting discovery pursuant to that motion as a result of the findings of the *Soto* opinion. The Superior Court, Law Division, denied that motion on February 8, 2000, in part on the basis that Gibson had not presented sufficient evidence of racial profiling and/or the probable illegality of his stop and arrest.

Eight years after Gibson's conviction, on January 29, 2002, the Appellate Division of the New Jersey Superior Court reversed the trial judge's decision, "primarily because of exculpatory materials finally uncovered in November of 2000 in proceedings separate from Plaintiff's, which tended to show

that (1) Plaintiff was illegally stopped and arrested and (2) Plaintiff was innocent." (Compl., ¶63). The Appellate Division ordered that Gibson could be released on bail upon application to the trial court.

On April 19, 2002, the trial court granted Gibson's motion to dismiss and vacated his conviction on the ground "that there was a colorable basis to believe that Plaintiff's stop and arrest was the result of an unlawful racial profiling stop." (Compl., ¶65). Gibson's conviction was vacated and the indictment was dismissed with prejudice

E. *Gibson's Civil Rights Action*

On November 14, 2002, Gibson filed this civil rights action in federal court against the New Jersey State Trooper Defendants, Pennypacker and Reilly; the Superintendent, New Jersey Department of Law and Public Safety, Division of State Police (in his or her official capacity); the New Jersey Turnpike Authority; the Treasurer, State of New Jersey, Treasury Department; former New Jersey Attorney General Peter Verniero; and Deputy Attorneys General Ronald Susswein, John Fahy, and George Rover. Gibson alleges that during the bulk of his confinement, Defendants—particularly Verniero, Susswein, Fahy and Rover—were aware of the evidence of racial profiling which would have invalidated the convictions of Gibson and others and that this information was exculpatory, but that these defendants intentionally kept that information secret.

Gibson claims that his unconstitutional arrest, conviction and confinement were the result of the New Jersey State Police policy, custom or practice of encouraging its officers to racially profile Turnpike motorists in such a manner which seemingly justifies the officers' actions but in reality constitutes illegal stops, searches, seizures and arrests of minority motorists, without probable cause or reasonable suspicion. (Compl., ¶66).

Gibson's constitutional injuries also are the result of the defendants' policy of actively suppressing information about racial profiling and misconduct of the New Jersey State Police. (Compl., ¶67). These policies and practices were instituted and maintained, during the times relevant to Gibson's complaint, with the knowledge and supervision of Defendant New Jersey Turnpike Authority, the individually named defendants, and the New Jersey State Police hierarchy, who had the ultimate supervisory responsibility for all personnel in the New Jersey State Police. (Compl., ¶¶68, 69). Because all of the defendants were aware of the allegations and information showing that the New Jersey State Police and its officers had a policy of racial profiling, particularly from the court's findings in *State v. Soto* that covered the same area of the Turnpike where Gibson was arrested, their: (1) failure to conduct any meaningful investigation or review of the New Jersey State Police policy, custom or practice that resulted in the stop and search of Gibson on October 28, 1992 and his subsequent eight years of confinement; (2) deliberate suppression of information that showed the widespread practice of racial profiling; and (3) failure to train New Jersey State Police officers to end the practice, to correct their abuse of authority, or to discourage the unlawful use of their authority, caused Gibson to suffer a constitutional deprivation. (Compl., ¶¶73-75).

The misconduct attributed to all of the defendants includes:

- Failing to properly discipline, restrict and control employees, including Defendants Pennypacker and Reilly, who were known to be engaging the practice of racial profiling;

- Failing to take adequate precautions in the hiring, training, promotion and retention of police personnel, including Defendants Pennypacker and Reilly;

- Failing to establish and/or assure the functioning of a bona fide and meaningful departmental system for dealing with

complaints, allegations and information about racial profiling, and instead responding to such complaints with bureaucratic resistance and official denials calculated to mislead the public;

- Intentionally suppressing known evidence of racial profiling that would have benefitted Gibson in his criminal trial and subsequent appeals and collateral petitions.

(Compl., ¶ 76).

As a result of Defendants' misconduct, Plaintiff suffered extreme emotional trauma and was wrongly incarcerated for eight years. (Compl., ¶77).

Count I of the complaint seeks damages against all of the defendants under 42 U.S.C. §1983. This count alleges that Defendants, acting under color of state law, deprived Gibson of his "constitutional and civil right to meaningful access to the courts, derived from Article IV, the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution" and "the right to be free from unconstitutional conviction and imprisonment...."(Compl., ¶81). The defendants caused these constitutional deprivations by:

- Detaining Plaintiff without probable cause;
- Searching and seizing the car Plaintiff was in without probable cause;
- Searching Plaintiff without probable cause;
- Falsely imprisoning Plaintiff;
- Improperly denying Plaintiff access to fair and meaningful judicial proceedings during his criminal trial, subsequent post-conviction proceedings and separate civil suits by suppressing evidence beneficial to Plaintiff in violation of *Brady v. Maryland*, similar state law and ethical duties;

- Depriving Plaintiff of his constitutional right to due process;
- Depriving Plaintiff of his constitutional right to equal protection of the laws;
- Imprisoning Plaintiff unconstitutionally for a charge later vacated by motion of the State;
- Failing to train subordinates;
- Failing to supervise/control subordinates;
- Failing to correct the unconstitutional/discriminatory practices of subordinates;
- Continually condoning and ratifying a history of unconstitutional/discriminatory acts despite numerous allegations over the years of discrimination based on race;
- Improperly screening, hiring, training, supervising, disciplining and retaining dangerous police officers.

(Compl., ¶81).

Gibson alleges that all of the above acts constitute violations of his constitutional rights, but the defendants prevented him from pursuing remedies for those violations because of their withholding of racial profiling information. Thus, "[b]ut for Defendants' unlawful acts, Plaintiff would not have been denied meaningful access to the courts in his criminal proceedings and post-conviction relief proceedings; and would have been able to bring a civil cause of action against Defendants for Plaintiffs civil rights violations. As a direct result of Defendants' unlawful acts which denied Plaintiff his right to access the courts, Plaintiff cannot seek remedy by way of the causes of action mentioned in the previous paragraph since they are either time barred or moot." (Compl., ¶¶ 83-84).

Count II seeks injunctive relief from Defendant Superintendent of New Jersey State Police. Count III alleges a conspiracy under 42 U.S.C. §1983 to deprive Gibson of his constitutional rights to meaningful access to the courts and to be free from unconstitutional conviction and imprisonment. Count IV alleges that Defendants conspired to violate Gibson's constitutional rights on the basis of his race in violation of 42 U.S.C. §1985. Count V claims violations of Gibson's state constitutional rights. And Count VII alleges a violation of N.J. Stat. Ann. §52:4C (mistaken imprisonment).[3]

II. *MOTION TO DISMISS*

Defendants move to dismiss Gibson's complaint on the grounds that all of Gibson's claims are time-barred; that Defendants Verniero, Susswein, Fahy and Rover are entitled to Eleventh Amendment immunity, absolute prosecutorial immunity, and qualified immunity; and that the Treasurer, State of New Jersey is entitled to Eleventh Amendment immunity.

A. *Statute of Limitations*

Defendants argue that Gibson's claims regarding the unconstitutionality of the automobile stop and search are barred by the two-year statute of limitations because they accrued on the date of the automobile stop in October 1992.[4] Gibson argues that his claims did not accrue until his conviction was

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[3] The complaint does not contain a Count VI.

[4] The parties agree that a two-year limitations period applies to Gibson's Section 1983 claims. In *Wilson v. Garcia*, 471 U.S. 261 (1985), the Supreme Court held that the appropriate limitations period for actions brought under Section 1983 is the state limitations period governing a tort action for the recovery of damages for personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985). In New Jersey, a two-year statute of limitations governs personal injury claims. N.J. Stat. Ann. §2A:14-2.

vacated on April 19, 2002 and, therefore, his complaint filed on November 14, 2002 is timely.

Although the limitations period for a Section 1983 claim is governed by state law, the accrual of the claim is governed by federal law. "It is axiomatic that under federal law, which governs the accrual of section 1983 claims, 'the limitations period begins to run from the time when the plaintiff knows or has reason to know of the *injury* which is the basis of the section 1983 action.'" *Montgomery v. DeSimone*, 159 F.3d 120, 126 (3d Cir. 1998) (quoting *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991)) (emphasis added).

The Supreme Court has held that the accrual of a §1983 claim seeking damages for unconstitutional conviction or confinement may be tolled when the §1983 claim overlaps with an opportunity to pursue state remedies or federal *habeas corpus* relief. *Heck v. Humphrey*, 512 U.S. 477 (1994). The §1983 plaintiff in *Heck* filed a civil rights action against two prosecutors and a government investigator while the plaintiff's direct appeal of his manslaughter conviction was still pending in state court. He sought money damages for his allegedly unconstitutional conviction. In determining whether such an action for money damages was available, the Court began by noting that since §1983 "creates a species of tort liability," the common law of torts "defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under §1983 as well." 512 U.S. at 483. The Court analogized Heck's claim to a common law malicious prosecution claim because "unlike the related cause of action for false arrest or imprisonment," a malicious prosecution claim allows a plaintiff to recover for unlawful imprisonment pursuant to legal process. *Id.* at 484. A necessary element of a malicious prosecution claim is the termination of the criminal proceedings in favor of the accused:

> This requirement "avoids parallel litigation over the issues of probable cause and guilt. . . and it precludes the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction[s]. Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit."

512 U.S. at 484-85 (citations omitted).

For those reasons, the Court held that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to §1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution." *Id.* at 486.

Accordingly, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a §1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated has not accrued. *Id.* Accordingly, a "district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* If not, then the §1983 action would be allowed to proceed. *Id.*

In a footnote, the Court provided an example of when a §1983 claim would not have to wait until a conviction or sentence has been invalidated: "For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a §1983 action, even if successful would not *necessarily* imply that the plaintiffs conviction was unlawful." (citations omitted). *Heck v. Humphrey*, 512 U.S. at 487 n.7. *See also Smith v. Holtz*, 87 F.3d 108 (3d Cir. 1996) (extending *Heck* and holding that a §1983 claim challenging the legality of a conviction did not accrue until the *potential* for judgment in pending criminal prosecution ceases to exist).

In *Montgomery v. DeSimone*, the Third Circuit held (also in a footnote) that §1983 claims for Fourth Amendment violations alleging false arrest and false imprisonment did not *necessarily* implicate the validity of a conviction "[b]ecause a conviction and sentence may be upheld even in the absence of probable cause for the initial stop and arrest . . . ." 159 F.3d at 126 n.5. The court came to this conclusion without conducting a fact-based inquiry as to whether the underlying conviction would, in fact, have been valid absent probable cause for the initial stop and arrest.[5] Therefore, because the accrual of the

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[5] This footnote in *Montgomery* appears to be the only contribution that the Third Circuit has made to an issue that has caused a split in the circuits—that is, on a question of whether a §1983 claim that, if successful, would have resulted in suppression of evidence (such as a Fourth Amendment unreasonable search and seizure claim, rather than a claim like malicious prosecution that necessarily negates the validity of a conviction) is subject to the *Heck* accrual rule, whether a court should undertake a fact-based inquiry to determine if the underlying conviction would still have

§1983 plaintiff's false arrest and false imprisonment claims did not hinge upon the resolution of the criminal charges in her favor, the Third Circuit looked to when the plaintiff knew of the injury for which she sought damages. Because a claim for false arrest "covers damages only for the time of detention until the issuance of process or arraignment, and not more," and the false imprisonment claim "relates only to her arrest and the few

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been obtained even if the seized evidence would have been tainted by the constitutional violation. The Second, Sixth and Ninth Circuits have held that a court should undertake such a fact-based inquiry to determine if the §1983 claim accrued at the time of the violation or if had to wait until the conviction was invalidated. *See. e.g., Covington v. City of New York*, 171 F.3d 117 (2d Cir. 1999) (holding that issue of fact existed as to nature of evidence that had been available against §1983 plaintiff in criminal case and thus question under *Heck* whether success of §1983 plaintiffs false arrest claim would necessarily imply invalidity of conviction, critical to the accrual of §1983 claim, could not be determined as a matter of law); *Harvey v. Waldron*, 210 F.3d 1008 (9th Cir. 2000) (holding that §1983 claim premised on illegal search and seizure did not accrue until conviction was dismissed because evidence seized was essential to the conviction); *Shamaeizadeh v. Cunigan*, 182 F.3d 391 (6th Cir. 1999).

The Seventh, Eighth and Eleventh Circuits have held, on the other hand, that all Fourth Amendment unreasonable search claims brought against state officials under §1983 may go forward without a factual examination of whether the conviction would have been obtained without the fruits of the alleged Fourth Amendment violation. *See. e.g., Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998) (holding that all §1983 Fourth Amendment claims "may be brought immediately" and that district court need not "speculate" as to whether seized evidence would have been admissible anyway); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (holding that because harmless error analysis applies to confessions obtained in violation of the Fifth Amendment, as with Fourth Amendment claims, a coerced-confession claim in a §1983 action does not necessarily imply invalidity of conviction); *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (holding that *Heck* "is no bar to Datz' civil action because, even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error").

hours she was detained immediately following her arrest," the court concluded that the plaintiff reasonably knew of the injuries that formed the basis of her §1983 claims on the night of her arrest. *Id.* at 126. The court held that the §1983 claims for false arrest and false imprisonment, filed more than two years after the plaintiff's arrest, were time-barred. *Id.*

1. *Gibson's Fourth Amendment and Malicious Prosecution Claims*

Defendants here argue that to the extent Plaintiff Gibson alleges violations of his Fourth Amendment rights and seeks damages for an unreasonable stop and search, those claims are time-barred because, consistent with the reasoning of *Montgomery v. DeSimone,* those claims fall outside the *Heck* accrual rule and Gibson knew of his injuries on the date of the stop in October 1992. Defendants also argue that to the extent Gibson alleges a constitutional claim for malicious prosecution, that claim fails because Gibson cannot establish one essential element—absence of probable cause for the initiation of criminal proceedings.

This Court agrees. To the extent that Gibson seeks damages for an unreasonable stop and search or unlawful arrest in violation of the Fourth Amendment, success on those claims would not necessarily have demonstrated the invalidity of his conviction, according to *Montgomery v. DeSimone*. They, therefore, do not fall within the *Heck* rule, and they accrued when the stop and search occurred in October 1992. They are thus time-barred here. As for a malicious prosecution claim, Gibson represents that he is not bringing such a claim. But his complaint could be construed as seeking damages for an unlawful conviction and confinement, and those damages are recoverable on a claim for malicious prosecution—like the claims in *Heck* and *Smith*—and are not recoverable on a claim based on an unlawful stop, search, arrest or imprisonment.

Thus, to the extent that Gibson brings a claim for malicious prosecution, that claim is time-barred.

2. *Gibson's Selective Enforcement Claims*

Apart from claims based on Fourth Amendment violations or malicious prosecution, as explained in his brief in opposition to this motion to dismiss, Gibson maintains that his "complaint, in large part, is based on a claim of selective enforcement in violation of the Fourteenth Amendment." (Pl. Br., at 23-24). The relevant question, therefore, is whether such a claim is subject to the *Heck* accrual rule. If not, the inquiry turns to when Gibson knew or had reason to know of his constitutional injury. *Montgomery v. DeSimone*, 159 F.3d at 126.

Selective enforcement in the form of racial profiling can constitute a violation of a person's right to equal protection and is actionable under §1983. *Carrasca v. Pomeroy*, 313 F.3d 828, 834 (3d Cir. 2002). To prevail on an equal protection claim in the racial profiling context, a plaintiff must show that the challenged law enforcement practice had a discriminatory effect and was motivated by a discriminatory purpose. *Id.*

The Supreme Court held in *Whren v. United States*, 517 U.S. 806, 813 (1996), in the context of an automobile stop, that although selective enforcement can violate the equal protection clause, it has no bearing on the question of whether a search or seizure was unreasonable under the Fourth Amendment. *See also Carrasca v. Pomeroy*, 313 F.3d at 836 ("The fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for enforcement of a law. Plaintiffs' equal protection claims under the Fourteenth Amendment require a wholly separate analysis from their claims under the Fourth Amendment."). Thus, a stop or an arrest may be otherwise valid even though the arresting officers engaged in selective enforcement in choosing to make the stop or arrest. *See Rogers v. Powell*, 120 F.3d 446, 453 n.5 (3d Cir.

1997) ("We acknowledge that an arrest is not rendered invalid by the fact that the basis for the arrest, though legitimate, was merely pretextual.") (citing *Whren*)); *see also Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 424-25 (3d Cir. 2003) ("It is well established . . . that selective prosecution may constitute illegal discrimination even if the prosecution is otherwise warranted.") Put another way, even if Gibson's conviction had been affirmed through the channels of state appellate review, and a petition by Gibson for federal *habeas corpus* relief denied, unlike a §1983 claim for malicious prosecution, he could still maintain a §1983 action for money damages on the grounds that law enforcement engaged in selective enforcement in violation his equal protection rights, and a successful judgment on that §1983 claim would have no effect on his conviction or confinement. Under footnote 5 of the *Montgomery v. DeSimone* opinion, the question of whether an equal protection violation would have justified suppression of the seized evidence and, if so, what effect that suppression would have had on Gibson's conviction does not seem to be an inquiry that the Third Circuit finds relevant to a *Heck* accrual analysis. Consequently, like the Third Circuit found in *Montgomery v. DeSimone*, this Court finds that Gibson's selective enforcement claims "are not the type of claims contemplated by the Court in *Heck* which necessarily implicate the validity of a conviction or sentence." 159 F.3d at 126 n.5.

The question of accrual then turns on when Gibson knew or had reason to know of his constitutional injury resulting from the alleged selective enforcement. At different points in his complaint, Gibson appears to seek damages for unconstitutional stop and search, and for unconstitutional conviction and confinement, although he also concedes that his claims for these injuries are time-barred. (Compl., ¶84). He also seeks damages for being denied his right to meaningful access to the courts. Despite this moving target of a constitutional injury, the logical flow of damages for a claim of selective

enforcement by police officers in the context of an automobile stop stems from the initial automobile stop itself. Thus, Gibson's constitutional injury on his selective enforcement claims occurred when Troopers Pennypacker and Reilly stopped Gibson's car for racially discriminatory reasons. Gibson had reason to know of his constitutional injury at that time. Because this action was filed more than two years after the automobile stop, Gibson's claims under §1983 for selective enforcement in violation of the Fourteenth Amendment are time-barred.

3. ***Gibson's Claims for Failure to Train***

Under the same reasoning, Gibson's claims of failure to train, supervise, remedy and end the discrimination brought against the New Jersey State Police hierarchy and New Jersey Turnpike Authority accrued at the time that these failures caused an injury to Gibson—when the car he was riding in was stopped. In addition to arguing that this claim did not accrue until his release from prison because its success would have implied the invalidity of his conviction (an argument that this Court rejects upon the reasoning set forth above), Gibson alternatively argues that he could not have filed this claim until November 27, 2000 because he was not on notice of the direct evidence of racially biased training which established this claim until the extent of the institutional nature of racial profiling was finally revealed. Therefore, he argues, his complaint filed on November 14, 2002 is timely.

To the extent that Gibson argues he is entitled to application of the discovery rule, this Court disagrees. The discovery rule operates such that "the accrual of a cause of action will be delayed until such times as a plaintiff knows, or after the exercise of reasonable diligence, should know, that he had been injured and that this injury was caused by the fault of another." *Rolax v. Whitman*, 175 F. Supp.2d 720, 727 (D.N.J. 2001), aff'd. 53 Fed. Appx. 635, 2002 WL 31528790 (3d Cir.

2002). A plaintiff does not need to be on notice of the extent of the evidence supporting his claim in order to know that he has suffered an injury that was caused by another. "Sufficient notice to alert [the plaintiff] of the need to begin investigation will cause the statute to accrue." *Id.* The Court notes that given the *Soto* decision and the other evidence of racial profiling that Gibson sets forth in his complaint, November of 2000 was not the first time that Gibson was on notice that the practice of racial profiling existed in the New Jersey State Police. He has not given this Court any basis upon which to conclude that his constitutional injury on his failure to train claim occurred on any date other than the date his car was stopped in October 1992.

4. Gibson's Claims for Denial of Access to the Courts

Not appropriate for dismissal on statute-of-limitations grounds, however, are Gibson's claims that the defendants' cover-up of the widespread practice of racial profiling deprived Gibson of his right of meaningful access to the courts. The Supreme Court in *Christopher v. Harbury*, 536 U.S.403, 412-16, 415 n.12 (2002), discussed the nature of a constitutional claim for denial of access to the courts and noted that the right of access to courts has at different times been held to be grounded in Article IV of the Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Breaking down the constitutional claim of denial of access to the courts into three categories, the Court explained that the "second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried (or tried with all material evidence) . . . ." 536 U.S. at 413-14. "The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, *e.g.*, *Foster v. Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994);

Bell v. Milwaukee, 746 F.2d 1205, 1261 (7th Cir. 1984) ('[T]he cover-up and resistance of the investigating police officers rendered hollow [the plaintiff's] right to seek redress.'), the loss of an opportunity to sue, *e.g.*, *Swekel v. River Rouge*, 119 F.3d 1259, 1261 (6th Cir. 1997) (police cover-up extended throughout time to file suit . . . under . . . statute of limitations'), or the loss of an opportunity to seek some particular order of relief . . . :" *Id.* at 414. "These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." *Id. See also Brown v. Grabowski*, 922 F.2d 1097, 1111 (3d Cir. 1990) (noting that "an individual's constitutional right of access to the courts is well settled" and "clearly is actionable under section 1983"). Injuries compensable under this theory include the loss of an opportunity to sue (because, for example, police cover-up caused a statute of limitations to run) and the loss of an opportunity to seek some particular order of relief. *Id.* at 413-14.

Defendants have made only the most meager of arguments in support of the untimeliness of this claim, relegating it to a one-sentence footnote in their brief. The Court concludes that sufficient factual issues exist as to when this claim accrued so as to render dismissal of this claim under Rule 12 improper.

B. ***Eleventh Amendment Immunity***

Defendants further argue that the complaint must be dismissed against Defendants Verniero, Susswein, Rover and Fahy because these defendants are immune from suit under the Eleventh Amendment, which prohibits suits against state officers for actions taken in their official capacities, absent an unequivocal waiver. Defendants argue that although Plaintiff Gibson purports to sue them in their individual capacities, the language of the allegations against them indicates otherwise.

Because this Court must look beyond the language of the complaint and determine whether the defendants are actually being sued in their official capacities, Defendants maintain that such an inquiry here leads to the conclusion that Defendants Verniero, Susswein, Rover and Fahy are being sued for actions taken in their roles as public officials and, therefore, claims for money damages against them must be dismissed.

Eleventh Amendment immunity is an affirmative defense and the burden is thus on the state official defendants to establish their immunity from suit. *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999). State officials acting in their official capacities are outside the class of "persons" subject to liability for money damages under §1983. *Hafer v. Melo*, 502 U.S. 21 (1991). Because official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent," suits against state officials in their official capacities are therefore treated as suits against the State. 502 U.S. at 25. Personal-capacity suits, on the other hand, seek to impose individual liability upon a government officer for actions taken under color of state law. *Id.* Suits for money damages against state officials in their personal capacities are not considered suits against the State and are, thus, not barred by the Eleventh Amendment. The *Hafer* Court rejected the proposition that personal-capacity suits against state officials are only proper when a §1983 plaintiff alleges that the state official took some action that was outside the official's authority or not essential to the operation of state government.

Here, there is no basis to conclude that Plaintiff Gibson sued Defendants Verniero, Susswein, Rover and Fahy in their official capacities. The language of the complaint unambiguously states that these defendants are sued in their individual capacities, and the fact that these defendants' allegedly unconstitutional actions were taken during the course

of their roles as s officials does not automatically render these defendants immune from suit under the Eleventh Amendment. *See Hafer v. Melo*, 502 U.S. at 363 (finding unpersuasive the view that § 1983 liability turns on the capacity in which state officials acted when injuring plaintiff, rather than on the capacity in which the state officials were sued). Thus, the Court finds that defendants have not met their burden of establishing that the claims against them are barred by the Eleventh Amendment, and the motion to dismiss on these grounds will be denied.

C. *Prosecutorial Immunity*

Defendants Verniero, Susswein, Rover and Fahy also claim that they are entitled to absolute immunity because they were acting in their roles as prosecutors in the conduct alleged in the complaint.

In *Imbler v. Pachtman*, 424 U.S. 409,430 (1976), the Supreme Court extended absolute immunity to prosecutors when their "activities were intimately associated with the judicial phase of the criminal process." More specifically, the Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983." *Id.* at 431. Therefore, a prosecutor is absolutely immune when acting as an advocate in judicial proceedings. *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997). However, "a prosecutor acting in an investigative or administrative capacity is protected only by qualified immunity." *Kulwicki v. Dawson*, 969 F.2d 1454, 1463 (3d Cir.1992) (citations omitted). "In determining whether absolute immunity is available for particular actions, the courts engage in a 'functional analysis' of each alleged activity." *Id.*

"The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87

(1991). The Supreme Court has been "quite sparing" in its recognition of absolute immunity and has refused to extend it any "further than its justification would warrant." *Id.*

Here, this Court agrees with Plaintiff Gibson that his allegations against Defendants Verniero, Susswein, Rover and Fahy plead conduct in which these defendants were acting in an investigative or administrative capacity, not as an advocate in judicial proceedings. Keeping in mind the presumption in favor of qualified immunity and the court's duty to construe the complaint in favor of Plaintiff, this Court concludes that these defendants have not met their burden of showing that they are entitled to absolute prosecutorial immunity.

D. *Qualified Immunity*

Finally, Defendants Verniero, Susswein, Rover and Fahy, along with Troopers Pennypacker and Reilly, argue that they are entitled to qualified immunity.

The threshold question for the court in a qualified immunity analysis is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). *See also Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier v. Katz*, 533 U.S. at 201. "On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established." *Id.*

This second question—whether the right was clearly established—"must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* For example, on an issue of whether an officer used excessive force

during an arrest (which was the issue in *Saucier*) it is not enough to ask whether the general proposition that excessive use of force during an arrest violates the Fourth Amendment was clearly established. Rather, the right that the state actor is alleged to have violated "must have been 'clearly established' in a more particularized, and hence more relevant sense." *Id.* at 202 (*quoting Anderson v. Creighton*, 483 U.S. 645 (1987) and citing *Wilson v. Layne*. 526 U.S. 603 (1999) ("[A]s we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.")). *See also In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998) ("In determining whether a defendant's conduct impinged upon clearly established constitutional rights, the courts are required to conduct more than a generalized inquiry into whether an abstract constitutional right is implicated."). It is not required, however, in order to hold that state actors' conduct violated a clearly established right, that there be prior published cases with facts "materially similar" to the instant situation. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. at 739 (citation omitted). In other words, "in the light of preexisting law the unlawfulness must be apparent." *Id.* (citation omitted). *See also Sterling v. Borough of Minersville*, 232 F.3d at 193 ("A right is clearly established if its outlines are sufficiently clear that a reasonable officer would understand that his actions violate that right."). The status of the right as clearly established and the reasonableness of the official conduct are questions of law. *Sterling v. Borough of Minersville*, 232 F.3d at 193.

Because the Court finds that oral argument, along with more specific briefing focused solely on Gibson's constitutional claim that the state defendants denied him meaningful access to the courts as a result of their longstanding cover-up of institutional racial profiling, would be helpful to the resolution of the state defendants' qualified immunity analysis, Defendants' motion on these grounds will be denied without prejudice, and the parties will be ordered to submit further briefing, in accordance with the dates set forth in the accompanying Order.

E. *Claim Against Treasurer, State of New Jersey*

Gibson seeks money damages under Count VII against the Treasurer, State of New Jersey pursuant to the New Jersey mistaken imprisonment statute, N.J. Stat. Ann. §52:4C. This statute authorizes a person who was "convicted and subsequently imprisoned for one or more crimes which he did not commit" to "bring a suit for damages in Superior Court against the Department of the Treasury." N.J. Stat. Ann. §52:4C-2. Defendants argue that pursuant to the plain language of the statute, this statute only authorizes a suit in state court, not federal court, and that therefore this claim is barred by the Eleventh Amendment. Gibson argues in response that the statute is permissive—speaking in terms of "may" rather than "shall" or "only"—and that, consequently, because it is a remedial statute and thus broadly construed, it does not bar suit in federal court.

As explained above, the Eleventh Amendment prohibits suits in federal courts against state governments, or state officers for actions taken in their official capacities. *See Hafer v. Melo*, 502 U.S. 21 (1991). However, "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). The "test for determining whether a state has waived its [Eleventh Amendment]

immunity from federal-court jurisdiction is a stringent one." *Id.* at 241. In *Edelman v. Jordan*, 415 U.S. 651,673 (1974), the Supreme Court declared that a state will be deemed to have waived its immunity "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" (citation omitted). *See also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-306 (1990).

A state's consent by statute to be sued in its state courts is not sufficient to constitute a waiver of its Eleventh Amendment immunity. *Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 149-50 (1981); *Port Auth. Trans-Hudson Corp. v. Feeney*. 495 U.S. at 306. Rather, for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, "it must specify the State's intention to subject itself to suit in *federal court*." *Atascadero State Hosp.*, 473 U.S. at 241. Moreover, the Eleventh Amendment prohibits federal court pendent jurisdiction over state law claims against state officers. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

New Jersey's mistaken imprisonment statute, N.J. Stat. Ann. §52:4C, does not contain the express, unambiguous language waiving the State's immunity from being sued in federal court that is required under Supreme Court Eleventh Amendment jurisprudence. The statute's authorization to sue the State in New Jersey Superior Court does not waive the State's immunity from suit in federal court. Gibson's claim under Count 7 against the Treasurer, State of New Jersey will therefore be dismissed with prejudice.

III. *CONCLUSION*

For the reasons expressed above, the defendants' motion to dismiss will be granted in part and denied in part, as follows:

1. The defendants' motion to dismiss as time-barred Plaintiff's constitutional claims for selective enforcement and failure to train (as well as any claims that reasonably can be construed to plead violations of the Fourth Amendment and malicious prosecution) is **GRANTED.**

2. The defendants' motion to dismiss as time-barred Plaintiffs constitutional claim for denial of access to the courts is **DENIED.**

3. The motion of Defendant Treasurer, State of New Jersey to dismiss Plaintiffs claim against it under N.J. Stat. Ann. §52:4C is **GRANTED.**

4. The motion of Defendants Verniero, Susswein, Fahy and Rover to dismiss Plaintiffs claims against them on the grounds of Eleventh Amendment immunity and prosecutorial immunity is **DENIED.**

5. The motion of Defendants Verniero, Susswein, Fahy, Rover, Pennypacker, and Reilly to dismiss Plaintiffs claims against them on the grounds of qualified immunity is **DENIED, without prejudice.** The parties are directed to submit further briefing and appear for oral argument on this issue in accordance with the dates set forth in the accompanying Order.

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

(Entry Nos. 19,23)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

Civil No. 02-5470 (1.BK)

ORIGINAL FILED
DECEMBER 12, 2003
WILLIAM T. WALSH, CLERK

EMORY E. GIBSON, JR.,

Plaintiff,

v.

SUPERINTENDENT OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY – DIVISION OF STATE POLICE; NEW JERSEY TURNPIKE AUTHORITY; SEAN REILLY; J.W. PENNYPACKER; PETER VERNIERO; RONALD SUSSWEIN; JOHN FAHY; GEORGE ROVER; TREASURER OF STATE OF NEW JERSEY; JOHN DOES 1-10,

Defendants.

ORDER

THIS MATTER having been brought before the Court upon motion by Daniel F. Dryzga, Jr., Esquire, attorney for Defendants Trooper J.W. Pennypacker, Trooper Sean Reilly; the Superintendent, New Jersey Department of Law and Public Safety, Division of State Police; the Treasurer, State of New Jersey, Treasury Department; former New Jersey Attorney General Peter Verniero; and Deputy Attorneys General Ronald

Susswein, John Fahy, and George Rover, for an Order dismissing Plaintiffs' Complaint; and the Court having considered the moving papers, and the opposition thereto; and for the reasons expressed in the Opinion issued this date;

IT IS this **12th day of December, 2003** hereby

ORDERED that Defendants' motion is **GRANTED IN PART and DENIED IN PART**, as follows:

1. The defendants' motion to dismiss as time-barred Plaintiffs constitutional claims for selective enforcement and failure to train (as well as any claims that reasonably can be construed to plead violations of the Fourth Amendment and malicious prosecution) is **GRANTED**. Those claims are hereby dismissed with prejudice.

2. The defendants' motion to dismiss as time-barred Plaintiffs constitutional claim for denial of access to the courts is **DENIED**.

3. The motion of Defendant Treasurer, State of New Jersey to dismiss Plaintiffs claim against it under N.J. Stat. Ann. §52:4C is **GRANTED**. That claim is hereby dismissed with prejudice.

4. The motion of Defendants Verniero, Susswein, Fahy and Rover to dismiss Plaintiffs claims against them on the grounds of Eleventh Amendment immunity and prosecutorial immunity is **DENIED**.

5. The motion of Defendants Verniero, Susswein, Fahy, Rover, Pennypacker, and Reilly to dismiss Plaintiffs claims against them on the grounds of qualified immunity is **DENIED, without prejudice**. Defendants shall submit a brief in support of a motion on this issue only by **January 16, 2004.** Plaintiff shall submit a brief in opposition by **January 30, 2004.** Defendants may submit a reply brief by **February 6, 2004**. The

parties are directed to appear for oral argument in Courtroom 4D, Mitchell H. Cohen United States Courthouse, 4th & Cooper Streets, Camden, New Jersey, on **February 9, 2004 at 10:00 a.m.**

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

cc: Hon. Ann Marie Donio

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 04-1847

EMORY E. GIBSON, JR.

Appellant

v.

SUPERINTENDENT OF NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY-DIVISION OF STATE POLICE; NEW JERSEY TURNPIKE AUTHORITY; SEAN REILLY; J.W. PENNYPACKER; PETER VERNIERO; RONALD SUSSWEIN; JOHN FAHY; GEORGE ROVER; JOHN DOES 1-10; TREASURER STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 02-cv-05470)
District Judge: Honorable Robert B. Kugler

Present: SCIRICA, *Chief Judge,* SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER and VAN ANTWERPEN, *Circuit Judges*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by Appellees having been submitted to all judges who participated in the decision of this

court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is hereby DENIED.

BY THE COURT,

/s/Franklin S. Van Antwerpen
Circuit Judge

DATED: August 17, 2005
William H. Buckman, Esq.
David Rudovsky, Esq.
John F. Hipp, Esq.
Robert P. Shane, Esq.

APPENDIX E

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENTS

AMENDMENT 4

1.

USCS Const. Amend. 4 (2005)

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14

USCS Const. Amend. 14 § 1 (2005)

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS
GENERALLY

1.

42 USCS § 1983 (2005)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOCKET NO.
Civil Action 02-cv-05470 (SSB)

EMORY E. GIBSON, JR.,

Plaintiff,

v.

SUPERINTENDENT OF NEW JERSEY – DEPARTMENT OF LAW & PUBLIC SAFETY – DIVISION OF STATE POLICE; NEW JERSEY TURNPIKE AUTHORITY; SEAN REILLY; J.W. PENNYPACKER; PETER VERNIERO; RONALD SUSSWEIN; JOHN FAHY; GEORGE ROVER; JOHN DOES 1-10 and TREASURER, STATE OF NEW JERSEY.

Defendants.

COMPLAINT & JURY DEMAND

Plaintiff, Emory E. Gibson, by way of Complaint against the Defendants, says:

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1985, and Article IV, the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. The jurisdiction of the Court is predicated on 28 U.S.C. §§ 1331 and 1343(1), (3) and (4). The supplemental

jurisdiction of this Court to hear related state causes of action is invoked.

PARTIES

3. Plaintiff Emory E. Gibson, an African American male, was a resident of Maryland at all times relevant to the allegations of this Complaint.

4. At all times relevant to this Complaint, Defendant Sean Reilly was employed by the State of New Jersey – Department of Law and Public Safety – Division of State Police (NJSP). Defendant Reilly is sued in his individual capacity.

5. At all times relevant to this Complaint, Defendant J.W. Pennypacker was employed by the NJSP. Defendant Pennypacker is sued in his individual capacity.

6. Defendant NJSP Superintendent is sued in his/her official capacity for injunctive relief only.

7. Defendant New Jersey Turnpike Authority (NJTA) exists under New Jersey statutes as a municipal corporation responsible for exercising public and governmental functions in the acquisition, construction, operation, maintenance and traffic control of the New Jersey Turnpike (Turnpike). The NJTA contracts with the NJSP to provide services on the Turnpike to patrol and police public highways. The NJTA, nevertheless, remains responsible for the safety of travelers lawfully on its property including, but not limited to, the law enforcement operations, policies and practices that occur thereon.

8. John Does 1-10 are persons who in any way aided, assisted or participated in (1) the stop, search and arrest of Plaintiff on October 28, 1992, or (2) the suppression of materials which were exculpatory in nature pertaining to the

criminal prosecution Plaintiff suffered subsequent to October 28, 1992. Defendants were, at all relevant times, acting individually and under the color of state law.

9. Treasurer, State of New Jersey, Treasury Department is the statutorily designated agent in all prosecutions pursuant to New Jersey's Mistaken Imprisonment Statute, N.J.S. § 52:4C-2 (2002). By virtue of this statute the State of New Jersey has consented to be sued for false convictions and imprisonments.

10. Defendant Peter Verniero is the former Attorney General of the State of New Jersey. He is sued in his individual capacity. Defendant was, at all relevant times, acting under the color of state law.

11. Defendants Ronald Susswein, John Fahy and George Rover were, at all relevant times, Deputy Attorney Generals for the State of New Jersey. They are sued in their individual capacities. Defendants were, at all relevant times, acting under the color of state law.

FACTS PERTAINING TO THE PATTERN AND PRACTICE OF RACIAL PROFILING

12. For almost twenty-five years, there have been complaints of racism concerning the activities of the NJSP on the Turnpike by both the public and, in more recent years, by state troopers themselves.

13. In 1967, a state commission faulted the NJSP for its aggressive response to African American rioters in Newark. In 1975, the United States Department of Justice (DOJ) filed a lawsuit against the NJSP under the Civil Rights Act of 1964 and the Equal Opportunity Act of 1972, alleging that the NJSP overlooked qualified minority and women applicants for employment with the NJSP. The court criticized the NJSP for ignoring past findings of

discriminatory practices and not setting up objective and standardized criteria and procedures for assignments, tenure, promotion and discipline to assure that minorities and women are treated equally and fairly.

14. In response to the lawsuit referenced in the preceding paragraph, the NJSP agreed, in a consent decree, to increase the number of African American and Hispanic troopers to 14 percent of the NJSP work force within five years. At that time, out of 1,765 troopers employed by the NJSP, 13 were African American, 5 were Hispanic and only 1 was a woman. Thereafter, three subsequent decrees were entered in the DOJ lawsuit before the lawsuit was resolved in 1992, seventeen years after the suit was filed. However, the NJSP never abided fully by the decrees and when the decrees expired in 1993 minority enrollment in the NJSP plummeted while Caucasian enrollment climbed dramatically, fueled by nepotism and bias.

15. In 1989, WOR (Channel 9) television aired a four-part investigative news program documenting racial profiling by the NJSP entitled "Without Just Cause." The series included the complaints of dozens of African American motorists stopped, detained, humiliated, but not arrested. The news program also presented statistical data revealing that, whereas the percentage of African American motorists driving on the Turnpike was modest, between 75% and 89% of all persons stopped by the NJSP were minorities and 76% of those arrested were African American.

16. The WOR series also reported that there was a pattern and practice under which improper and illegal stops occurred and, where no summonses were issued, the stops were not recorded by the NJSP because the troopers did not advise the dispatcher of these stops even though this was contrary

to written NJSP policies and procedures. This conduct was engaged in to avoid leaving evidence and records of racial profiling. An anonymous African American trooper with his face and voice disguised for the camera confirmed the practice of racial profiling on the Turnpike.

17. The NJSP Superintendent at the time responded to "Without Just Cause" by videotaping a message he ordered shown to all NJSP officers. This message acknowledged the existence of the allegations. Although the Superintendent admitted that stop data was necessary to verify the allegations of racial profiling, he refused to gather the essential data. The NJSP stonewalled, declaring that it was not necessary to gather data on who was stopped to ensure that the NJSP continued to execute the laws fairly. The Superintendent spoke to the troopers about the WOR series. He assured them that the program was nothing more than a reverse flow from their actions and that they should keep the heat on.

18. At the same time, state trooper training included the dissemination of intelligence alleging that black people of African American, Jamaican and Nigerian background, and Hispanic people with lineage to several Latin American countries, were the people transporting drugs through the State. The training exacerbated racism by suggesting to some state troopers that Jamaicans were particularly violent. A training video featured sensationalized and fictional movie clips portraying one Jamaican slashing another with a knife and showing street violence during a political demonstration in Kingston, Jamaica, all of which had nothing to do with drug trafficking.

19. At the same time the NJSP had in place a system of incentives including the Trooper of the Year Award which

provided strong incentive for troopers to make as many arrests as they could, despite the quality or legality of those arrests.

20. In *State of New Jersey v. Pedro Soto et al.* (March 4, 1996), the Honorable Robert E. Francis, J.S.C. of the Superior Court of New Jersey, Law Division, Gloucester County, ruled that the NJSP did in fact make race-based profile stops to increase criminal arrests and that this practice violated minority motorists' constitutional rights to equal protection and due process.

21. The court based its decision on a wealth of non-statistical evidence demonstrating that race was a critical trigger for police stops, and upon the unrefuted statistical evidence that a African American was 4.85 times more likely than a Caucasian to be stopped by troopers.

22. The court found that the racially discriminatory practices were tolerated and even encouraged at the highest levels of the NJSP.

23. In the opinion, Judge Francis expressly stated that there was evidence that the "utter failure of the NJSP hierarchy to monitor and control a crackdown program like DITU (New Jersey State Police Drug Interdiction Training Unit) or investigate the many claims of institutional discrimination manifests its indifference if not acceptance."

24. Instead of reacting responsibly to the *Soto* decision and making the necessary changes in the police bureaucracy, training, procedures and activities, the State attempted to conceal the disparities. The NJSP denied any problem and refused and/or neglected to investigate allegations of profiling for almost three years after Judge Francis' ruling.

25. Acting through its Attorney General, the State of New Jersey appealed Judge Francis' Order to the Superior Court of New Jersey, Appellate Division. In that appeal, the NJSP offered the inherently racist and repugnant assertion that African Americans may be stopped more because they drive in a manner to make themselves stand out from other drivers, in other words, they drive worse than Caucasians. The Attorney General and the NJSP put forth this rationalization even though their own witnesses in *Soto* testified that African Americans do not drive worse than Caucasians.

26. In or about December of 1996, Defendant Verniero began examining the then existing evidence of profiling in response to inquiries by the DOJ. He engaged Defendants Susswein, Fahy and Rover to aid in the task.

27. The DOJ made its inquiry of Defendant Verniero in contemplation of a suit or other action(s) aimed at ending racial profiling by the NJSP.

28. However, Defendants Verniero, Susswein, Fahy and Rover already knew that profiling existed inasmuch as Defendant Susswein had years earlier advocated some form of profiling through a memo circulated through the Office of the Attorney General.

29. Moreover, in responding to the DOJ inquiry, Defendants Verniero, Rover and Fahy withheld extensive information, of which they were aware, that showed, or tended to show, the existence of profiling.

30. On April 20, 1999, Defendant Verniero published the *Interim Report of The State Police Review Team Regarding Allegations of Racial Profiling* (April 20, 1999) [hereinafter Interim Report] which conceded that the practice of racial profiling was real.

31. However, the authors of the Interim Report, primarily Defendants Verniero and Susswein, intentionally withheld and suppressed the overwhelming evidence they had gathered showing that profiling was an entrenched agency wide policy in the NJSP.

32. Instead, Defendants Verniero and Susswein prepared a report which attempted to place the blame of profiling on a small number of individual troopers for a policy that Defendants knew of and encouraged.

33. As such, while the Interim Report provided Defendant Verniero a rationalization to allege he was investigating profiling, Defendant Susswein and Verniero studiously prepared a report that would be of no benefit to Plaintiff, or others similarly situated, should Plaintiff seek to end his imprisonment or apply to the courts for relief.

34. Concurrent with the production of the Interim Report, Defendants Fahy and Rover aided Defendant Verniero in gathering information about the practice of racial profiling by the NJSP in response to the DOJ inquiry.

35. Accordingly, Defendants Susswein, Verniero, Fahy and Rover were aware, jointly and severally, of information showing, or tending to show, racial profiling.

36. Defendants Verniero, Susswein, Rover and Fahy intentionally suppressed the information of racial profiling, in their possession, denying Plaintiff the opportunity to obtain freedom for a number of years.

37. Numerous lawsuits filed by former and present state troopers have alleged specific incidents, as well as a pervasive and condoned atmosphere of racial and ethnic discrimination and racial profiling both on the Turnpike and elsewhere in the State of New Jersey. These include,

but are not limited to, lawsuits filed by NJSP Troopers Vincent Bellaran and Emblez Longoria.

38. Judge Mary L. Cooper of the United State District Court, District of New Jersey, conducted a non-jury trial in the case of *Bellaran v. Division of NJSP*, Civil Action No. 91-4256 (MLP) (March 24, 1998). Bellaran, a NJSP Sergeant, alleged that there was a pervasive hostile work environment because of racial discrimination in the NJSP. Judge Cooper found that such racial discrimination was pervasive in the NJSP and also found that Belleran had been asked by supervisors to target African American motorists.

39. Judge Cooper found that evidence presented to her indicated that where there was a disproportionate number of African American troopers in any barracks, such as the Bloomfield Barracks on the New Jersey Parkway, the barracks were commonly referred to by supervising offices as Coonfield Barracks. Judge Cooper found that "language such as 'Coonfield barracks' went completely unpunished by Defendant despite its pervasive use [and] is telling of Defendant's tolerance of racial discrimination." *See* Memorandum Opinion, 38 (March 24, 1998). Judge Cooper also found that some troopers of the NJSP radioed headquarters after stopping a car containing African American motorists, and referred to the motorists and passengers as a "carload of coal." There is no evidence that any punishment for making such statements was ever imposed.

40. Statistical data assembled from governmental records by reporters of the New Jersey Star Ledger reveal that the NJSP continued to target minorities for traffic stops, evidenced by the fact that 75% of the people arrested on the Turnpike in the first two months of 1997 by New

Jersey State Troopers were minorities. Even as recently as February 28, 1999, then NJSP Superintendent Col. Carl A. Williams condoned the pattern and practice of racial profiling and repeated the stereotype to newspaper reporters that there was a link between particular racial and ethnic groups and particular drugs.

41. Cumulatively, the *Soto* and *Bellaran* decisions; the DOJ lawsuits initiated in 1972; the many employment discrimination complaints and law suits; and the Interim Report issued by the New Jersey Attorney General, establish that numerous facets of NJSP training, custom, procedures, protocols and culture constituted and/or contributed to a climate within the NJSP supportive of racial hostility, prejudice and profiling, which emphasized minorities as suspects who should be subject to stop, search and arrest.

42. The Interim Report does admit that at least some state troopers singled out African American and Hispanic motorists and that once they were pulled off the road they were three times more likely than whites to have their cars searched. The Attorney General's statistics on "searches" is particularly significant because counsel for *Soto*, more than five years earlier, expressly requested racial data on searches to make this very point, but the State and Defendants Fahy, Verniero, Susswein and Rover continued to deny the existence of profiling and refused to produce the information, of which they were aware, and would have shown the existence of profiling years before Plaintiff finally won his release.

43. Despite repeated and continuous notice and knowledge that NJSP troopers on the Turnpike were engaging in a practice of unlawful and unconstitutional stops of minority drivers, Defendant NJTA the individually named

Defendants, and the NJSP hierarchy, did nothing to prevent this practice from continuing.

44. Defendant NJTA and its officials, officers, servants and employees, failed to take adequate steps to prevent troopers from posing a danger to the well-being and to the constitutional rights of minority motorists on the Turnpike.

FACTUAL ALLEGATIONS CONCERNING THE STOP, SEARCH, ARREST, WRONGFUL CONVICTION AND IMPRISONMENT OF EMORY E. GIBSON

45. On October 28, 1992, Plaintiff Emory E. Gibson was a back seat passenger in an automobile traveling southbound on the Turnpike, en route to Maryland. Plaintiff and the two front seat occupants are African American.

46. Shortly before 4:20 a.m., the vehicle the three men were traveling in approached a brightly illuminated toll booth on the Turnpike. The driver paid the toll.

47. Plaintiff's vehicle left the toll booth.

48. A NJSP cruiser which contained Defendants Pennypacker and Reilly, was parked near the toll booth. The cruiser pulled out and followed the vehicle in which Plaintiff was located.

49. Defendants Pennypacker and Reilly first pulled alongside of the vehicle that Plaintiff was in and then examined the occupants of the vehicle. After viewing the occupants, Defendants Pennypacker and Reilly pulled behind the vehicle and activated the overhead lights of the NJSP vehicle.

50. The driver of the vehicle Plaintiff was in as a passenger, promptly stopped his vehicle in response to Reilly and Pennypacker's signal.

51. Defendants Reilly and Pennypacker exited the cruiser.

52. Defendants Reilly and Pennypacker illegally searched the vehicle Plaintiff was in and illegally searched, detained and arrested Plaintiff. At no time did Defendants Reilly and Pennypacker have probable cause and/or reasonable suspicion to pull over the vehicle Plaintiff was in, or to search, detain or arrest Plaintiff. At no time did Defendants seek to obtain a search and/or arrest warrant.

53. Plaintiff and the other occupants of the vehicle were criminally charged with various offenses and indicted on an allegation that Defendants Reilly and Pennypacker had found drugs in the car.

54. Plaintiff was tried on April 20 and 21, 1994. Despite the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), similar state law and ethical duties which require the State to disclose any evidence that may exonerate or benefit a criminal defendant, the prosecution did not disclose information in its possession to Plaintiff which related to the NJSP practice of racial profiling. Indeed, Defendant NJTA, the individually named Defendants and the NJSP hierarchy actively suppressed information which would have shown in all probability that the stop was a product of racial profiling and that Plaintiff was not guilty.

55. In the absence of all of the exculpatory evidence described above, Defendant NJTA, the individually named Defendants and the NJSP hierarchy having suppressed same, the jury found Plaintiff guilty on both counts.

56. At Plaintiff's trial the prosecution relied on the testimony of a supposed expert on drug interdiction and valuation, Dennis Tulley, along with the testimony of Defendants Reilly and Pennypacker.

57. Defendants Verniero and Fahy were additionally aware of exculpatory evidence concerning Tully, the supposed expert, inasmuch as a study of some troopers' behavior completed in the *Soto* matter showed Tully to have a monthly African American arrest rate on the Turnpike.

58. On February 18, 1999, Plaintiff filed a Petition for Post-Conviction Relief, challenging the denial of his Motion to Suppress, requesting discovery pursuant to that motion as a result of the *Soto* decision pertaining to racial profiling and challenging the competency of his trial attorney.

59. On February 8, 2000, the Superior Court, Law Division denied the request for post-conviction relief partially on the basis that Plaintiff had not presented sufficient evidence of racial profiling and/or the probable illegality of his stop and arrest.

60. During this entire time Plaintiff was in prison, having been placed there from the date of his false conviction in April of 1994 until his release in April of 2002.

61. During this entire time Defendant NJTA, the individually named Defendants and the NJSP hierarchy actively suppressed information that would have required either (1) Plaintiff's release from prison, or (2) a new trial based on the exculpatory information described herein and the misconduct of the State for suppressing same, as stated in *Brady v. Maryland* and similar state law.

62. During the entire time of his imprisonment, Plaintiff was prevented from accessing the courts either to (1) sue for a violation of his rights, for which the statute of limitations has since expired, or (2) petition for post-conviction relief, as a result of the suppression of exculpatory information and evidence by Defendant NJTA, the individually named Defendants and the NJSP hierarchy.

63. On January 29, 2002, the Superior Court of New Jersey, Appellate Division, reversed the trial judge's decision, primarily because of exculpatory materials finally uncovered in November of 2000 in proceedings separate from Plaintiff's, which tended to show that (1) Plaintiff was illegally stopped and arrested and (2) Plaintiff was innocent.

64. On the strength of the long suppressed exculpatory evidence, the Appellate Division ordered that Plaintiff could be released on bail upon application to the trial court.

65. Thereafter, on April 19, 2002, the Honorable Walter R. Barisonek granted a Motion to Dismiss and Vacate the Conviction of Plaintiff on the ground that there was a colorable basis to believe that Plaintiff's stop and arrest was the result of an unlawful racial profiling stop. Plaintiff's conviction was vacated and the indictment was dismissed with prejudice.

66. The incident described above is the result of the NJSP policy and/or custom or training encouraging its personnel to racially profile Turnpike motorists in such a manner which seemingly justifies the actions of the NJSP, namely illegal stops, searches, seizures and arrests of minority motorists, without probable cause and/or reasonable suspicion.

67. The conviction and imprisonment of Plaintiff is also a result of a policy of Defendants to actively suppress information about racial profiling and misconduct of the NJSP.

68. These practices and policies were instituted and maintained with the knowledge and supervision of Defendant NJTA, the individually named Defendants and

the NJSP hierarchy who had the ultimate supervisory responsibility for all personnel in the NJSP.

69. The NJSP policy of training troopers to racially profile, thereby justifying the NJSP troopers' actions, as described above, was instituted and maintained on the Turnpike at all times relevant to Plaintiff's Complaint, under the supervision of Defendant NJTA, the individually named Defendants and the NJSP hierarchy.

70. Defendant NJTA, the individually named Defendants and the NJSP hierarchy, at all times relevant, were aware that the practice of racial profiling was described in litigation concerning the NJSP in the Superior Court of New Jersey, Glouster County, in *State v. Soto et al.*, 324 N.J. Super. 66 (Law Div. 1996). In *Soto*, the activities of the NJSP on the Turnpike are described, particularly as they related to disproportionate stops, searches and arrests of African Americans.

71. Defendant NJTA, the individually named Defendants and the NJSP hierarchy have been aware of allegations and information indicating that the NJSP and its officers have a policy of emphasizing the need to concentrate on persons of African American and Hispanic ancestry as targets of stop, search and/or arrest on the Turnpike.

72. The *Soto* ruling in March of 1996 found, as a fact, that in the area Plaintiff was stopped, NJSP were particularly active in stopping African Americans and/or Hispanics for the purpose of stop and search. The court also found that the NJSP hierarchy had condoned, tolerated and encouraged the practice of targeting African Americans and Hispanics for stop and search on the Turnpike particularly in the area where Plaintiff was stopped and searched.

73. Defendant NJTA, the individually named Defendants and the NJSP hierarchy had actual knowledge of the Opinion of the Superior Court decision, as well as all of the evidence and allegations which were presented to the court in evidence in the case otherwise known as *State v. Soto,* since the NJSP has assigned a sergeant to be present during the course of the entire hearing.

74. Despite the Superior Court finding and extensive press and public exposure of the practices of the NJSP on the Turnpike, neither Defendant NJTA, the individually named Defendants nor the NJSP hierarchy did any meaningful investigation and/or review of the NJSP personnel practices, training or policy which resulted in the stop and search of Plaintiff on October 28, 1992 and his eight years of imprisonment. The information the individually named Defendants intentionally suppressed information they possessed concerning racial profiling.

75. Defendant NJTA, the individually named Defendants and the NJSP hierarchy had prior notice of the propensity of NJSP officers to engage racial profiling but took no steps to train NJSP officers to end the practice, to correct their abuse of authority or to discourage the unlawful use of their authority. The intentional failure to properly train NJSP officers, including Defendants Reilly, Pennypacker and John Does 1-10, includes the failure to instruct them in the applicable provisions of the law of arrest, search and seizure and the fact that race cannot be a legitimate factor for stops.

76. Defendant NJTA, the individually named Defendants and the NJSP hierarchy authorized, tolerated as institutionalized practices and ratified the misconduct herein above detailed by:

a) Failing to properly discipline, restrict and control employees, including Defendants Reilly, Pennypacker and John Does 1-10, known to be engaging in the process of racial profiling;

b) Failing to take adequate precautions in the hiring, training, promotion and retention of police personnel, including specifically Defendants Reilly, Pennypacker and John Does 1-10;

c) Failing to establish and/or assure the functioning of a bona fide and meaningful departmental system for dealing with complaints, allegations and information about misconduct and profiling, but instead responded to such complaints with bureaucratic resistance and official denials calculated to mislead the public.

d) Failing to promptly notify courts and the public of information known to Defendants tending to show that minority persons were being illegally stopped, arrested and prosecuted.

e) Intentionally suppressing known evidence of racial profiling that would have benefitted Plaintiff in his criminal trial and subsequent appeals and collateral petitions.

77. As a result of the above mentioned discriminatory and illegal acts by Defendants, Plaintiff suffered extreme emotional trauma and was wrongly incarcerated for a period of eight years.

78. Plaintiff has suffered, is suffering and will continue to suffer severe and irreparable injury by virtue of Defendants' acts, policies and practices as set forth herein. Plaintiff's fundamental constitutional rights have been violated and will continue to be violated by the acts of Defendants which chill and inhibit the right of access to

meaningful judicial proceedings and to be free from an unconstitutional conviction and imprisonment.

79. Plaintiff has no adequate or complete remedy at law to redress these violations of his constitutional rights. This suite therefore also includes a request for an injunction because said request is the only means of securing complete and adequate relief. No other remedy would offer Plaintiff substantial and complete protection from continuation of Defendants' unlawful and unconstitutional acts, policies and practices.

CAUSES OF ACTION

COUNT 1
VIOLATION OF 42 U.S.C. § 1983

80. Plaintiff repeats each and every allegation contained in the foregoing paragraphs as if set forth at length herein.

81. Defendants, under the color of state law, deprived Plaintiff of his constitutional and civil rights to meaningful access to the courts, derived from Article IV, the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and the right to be free from an unconstitutional conviction and imprisonment by, among other things:

Detaining Plaintiff without probable cause;

Searching and seizing the car Plaintiff was in without probable cause;

Searching Plaintiff without probable cause;

Arresting Plaintiff without probable cause;

Falsely imprisoning Plaintiff;

Improperly denying Plaintiff access to fair and meaningful judicial proceedings during his criminal trial, subsequent post-conviction proceedings and separate civil suits by suppressing evidence beneficial to Plaintiff in violation of *Brady v. Maryland,* similar state law and ethical duties;

Depriving Plaintiff of his constitutional right to due process;

Depriving Plaintiff of his constitutional right to equal protection of the laws;

Imprisoning Plaintiff unconstitutionally for a charge later vacated by motion of the State;

Failing to train subordinates;

Failing to supervise/control subordinates;

Failing to correct the unconstitutional/discriminatory practices of subordinates;

Continually condoning and ratifying a history of unconstitutional/discriminatory acts despite numerous allegations over the years of discrimination based on race;

Improperly screening, hiring, training, supervising, disciplining and retaining dangerous police officers.

82. The above acts constitute a violation of the Civil Rights Act, 42 U.S.C. § 1983 for a violation of one's civil and constitutional rights under the color of State law.

83. But for Defendants' unlawful acts, Plaintiff would not have been denied meaningful access to the courts in his criminal proceedings and post-conviction relief proceedings; and would have been able to bring a civil cause of action against Defendants for Plaintiff's civil rights violations.

84. As a direct result of Defendant's unlawful acts which denied Plaintiff his right to access the courts, Plaintiff cannot seek remedy by way of the causes of action mentioned in the previous paragraph since they are either time barred or moot.

85. As a proximate result of the aforementioned acts, Plaintiff has been damaged and has suffered severe emotional injuries, including mental distress and anguish.

COUNT 2
42 U.S.C. § 1983 - SEEKING INJUNCTIVE RELIEF ONLY

86. Plaintiff repeats each and every allegation contained in the preceding paragraphs as if set forth at length herein.

87. Plaintiff seeks from Defendant NJSP Superintendent, only injunctive relief as set forth below in Plaintiff's prayer for relief.

COUNT 3
VIOLATION OF 42 U.S.C. § 1983
(CONSPIRACY TO DEPRIVE ONE OF CIVIL RIGHTS)

88. Plaintiff repeats each and every allegation contained in the preceding paragraphs as if set forth at length herein.

89. Defendants, in their individual capacities conspired to violate Plaintiff's civil rights, namely the rights to meaningful access to the courts and the right to be free from an unconstitutional conviction and imprisonment.

COUNT 4
VIOLATION OF 42 U.S.C. § 1985
(CONSPIRACY TO VIOLATE CIVIL RIGHTS)

90. Plaintiff repeats each and every allegation contained in the above paragraphs as if set forth at length herein.

91. The acts of Defendants, in their individual capacities, constituted a violation of the Civil Rights Act, 42 U.S.C. § 1985, conspiracy to violate the civil rights of Plaintiff herein based on his race.

COUNT 5
STATE CONSTITUTIONAL CLAIMS

92. Plaintiff repeats each and every allegation contained in the preceding paragraphs as if set forth at length herein.

93. The illegal, unconstitutional and discriminatory acts of Defendants, both in their individual and official capacities, constituted acts and a custom and/or policy to use unlawful authority and force against Plaintiff, so as to illegally stop, search and arrest him, search and seize the vehicle he was in, and wrongfully imprison him in violation of his protected constitutional rights under the New Jersey State Constitution, including, but not limited to, Article 1, §§ 1 (Due process and equal protection); 5 (Denial of rights; discrimination) and 7 (Freedom from unreasonable searches and seizures).

94. Each individual Defendant was acting, at all relevant times, in furtherance of his duty to his employer. Defendant NJTA is also liable for this unlawful, tortious and unconstitutional conduct under the doctrine of respondeat superior liability. As a result of the aforesaid conduct, Plaintiff has been damaged, including violation of his civil rights, as well as suffering severe and permanent injury to his physical and emotional health.

COUNT 7
N.J. Stat. § 52:4C VIOLATION
(MISTAKEN IMPRISONMENT STATUTE)

95. Plaintiff repeats each and every allegation contained in the preceding paragraphs as if set forth at length herein.

96. The mistaken imprisonment statute grants a civil cause of action to innocent persons who have been wrongfully convicted of a crime and frustrated in seeking legal redress.

97. Defendants wrongfully imprisoned Plaintiff for eight years after a conviction obtained as a result of Defendants' bad faith and willful and wanton acts of racial profiling and failing to disclose to Plaintiff evidence that would have exonerated him, as required under *Brady v. Maryland,* related state law and ethical duties.

98. As a result, Plaintiff has suffered wrongful imprisonment for eight years and has been frustrated in seeking legal redress.

PRAYER FOR RELIEF

WHEREFORE Plaintiff, Emory E. Gibson, prays for relief and judgment against Defendants, including, but not limited to:

99. An award of compensatory damages and punitive damages, based on the intentional and malicious acts of Defendants, which are allowed by statutes pleaded herein, as well as any interest and costs of suit;

100. An award of reasonable attorneys's fees and all costs of suit and interest thereon;

101. An award of damages as allowed under 42 U.S.C. §§ 1983 and 1985;

102. Any other award and equitable relief allowed by statute, or pursuant to the equitable and just power of this Court to which Plaintiff is entitled;

103. Injunctive relief as follows:

A. An order permanently restraining and enjoining the State of New Jersey, Office of the Attorney General, NJSP Superintendent and NJTA from encouraging, teaching, training, and condoning officers in making race-based arrests and stops, or taking other law enforcement action based in whole or in part on the race or ethnic background of an individual or suppressing information tending to show that individuals have been so victimized and;

B. An order compelling the Office of the Attorney General, NJSP Superintendent and NJTA to take prompt, appropriate and effective corrective measures, including those that affect supervisory personnel, to prevent any policies, patterns or practices that encourage, teach, train, and condone troopers or employees in making any arrests, stops, searches or taking other law enforcement action based in whole or in part on the race or ethnic background of an individual or suppressing information tending to show that individuals have been so victimized and;

C. An order that the Office of the Attorney General, NJSP Superintendent and NJTA implement a system in which prompt, appropriate and effective disciplinary action is taken against anyone who engages in, teaches, trains, encourages, or condones making any arrests, stops, or other law enforcement action based in whole or in part on the race or ethnic background of an individual or suppressing information tending to show that individuals have been so victimized or suppressing information tending to show that individuals have been so victimized and;

D. An order compelling the Office of the Attorney General, NJSP Superintendent and NJTA to implement a system in which prompt, appropriate and effective disciplinary action is taken against anyone who engages in suppression of evidence beneficial to a criminal defendant.

E. Any other prospective injunctive relief that the Court finds just and appropriate under the circumstances.

JURY DEMAND

Plaintiff demands trial by jury as to all issues.

DATED: 11/8/02

/s/ William H. Buckman
William H. Buckman
Attorney for Plaintiff Emory E. Gibson

APPENDIX H

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – UNION COUNTY
CRIMINAL ACTION

IN THE MATTER OF
ALLEGED RACIAL PROFILING
BY THE NEW JERSEY STATE POLICE

AFFIDAVIT IN SUPPORT OF
MOTION TO VACATE CONVICTION

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

PAUL H. HEINZEL, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am a Deputy Attorney General of the State of New Jersey. In that capacity, I represent the State in these statewide proceedings regarding discovery issues pertaining to claims of selective enforcement by criminal defendants who allege that the enforcement actions taken against them were the product of racial profiling by the New Jersey State Police. I submit this affidavit in support of the State's motion to vacate the convictions and dismiss the indictments with prejudice in all post-trial matters that are the subject of this motion. A list of those cases is attached as Exhibit A.

2. The defendants listed on Exhibit A have asserted claims that the criminal charges against them were the product or fruit of racially driven selective enforcement, or racial profiling.

3. Moreover, pursuant to the determination of the Appellate Division in *State v. Ballard*, 331 *N.J. Super.* 529

(App. Div. 2000), the cases set forth in Exhibit A have been transferred to this Court as a result of a determination that a "colorable basis" exists to support an allegation of selective enforcement. Furthermore, each case falls within the time frame for which the Appellate Division found a colorable basis to exist in *State v. Ballard*, and also during the January 1, 1988 to April 20, 1999 time frame for which State has agreed that a colorable basis exists for purposes of this litigation. For the cases listed on Exhibit A that have not yet been transferred to this Court, the State has reviewed each one and confirmed that it falls within the above time frame.

4. Given the fact that each case that is the subject of this motion falls within the time frame in which the Court and the parties to this litigation have determined that a colorable basis exists, it appears one could argue and a conclusion could be reached by the court that colorable issues of racial profiling are present in each case.

5. Rather than litigating the issues of selective enforcement, whether generally or specifically, in the interests of justice the State hereby moves to vacate the judgments of conviction in these cases and to dismiss the indictments with prejudice.

The above-recited facts are true to the best of my knowledge.

Respectfully submitted,
/s/ Paul H. Heinzel
Paul H. Heinzel
Deputy Attorney General

Sworn to and subscribed before me
this 19th day of April, 2002.
/s/ Catherine A. Foddai
Catherine A. Foddai
An Attorney-At-Law of New Jersey

APPENDIX I

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CRIMINAL PART
SALEM COUNTY
INDICTMENT NO. 92-12-498

STATE OF NEW JERSEY,

Plaintiffs,

v.

ROBERT SMITH and EMROY GIBSON,

Defendants.

FILED
APRIL 19 2002
WALTER R. BARISONEK, J.S.C.

CRIMINAL ACTION

ORDER VACATING CONVICTION AND DISMISSING INDICTMENT

This matter having been opened to the Court by the State of New Jersey by Peter C. Harvey, Acting Attorney General (Paul H. Heinzel, Deputy Attorney General, appearing) for an order vacating the conviction and dismissing the indictment in this case as to defendant(s) Robert Smith and Emory Gibson, and the Court having considered the motion and good cause having been shown;

IT IS on this 19th day of April, 2002, ORDERED that the conviction entered against the foregoing specified defendant(s)

is hereby vacated and the indictment is hereby dismissed with prejudice as against those specified defendants.

/s/ Walter R. Barisonek,
Hon. Walter R. Barisonek, J.S.C.

No. 05-779

In The
Supreme Court of the United States

PETER VERNIERO, RONALD SUSSWEIN,
JOHN FAHY, GEORGE ROVER,
J.W. PENNYPACKER, and SEAN REILLY,

Petitioners,

v.

EMORY E. GIBSON, JR.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Introduction

Petitioners seek a writ of certiorari on two issues regarding the delayed-accrual rule of *Heck v. Humphrey*, 512 U.S. 477 (1994). First, petitioners argue that there is a division in the Circuit Courts of Appeals on how Fourth Amendment issues of unlawful detentions and searches should be treated under *Heck*. The great majority of the courts, like the Third Circuit in this case, approach the delayed-accrual issue on a fact-based, case-by-case basis to determine whether a ruling that a detention or search was illegal would imply the invalidity of the state criminal proceedings. Further, the trend in the Circuits is undeniably in this direction, with several courts of Appeals recently adopting this approach, including courts that had previously ruled that a Fourth Amendment claim does not imply the invalidity of the state criminal proceedings. Petitioners also argue several policy grounds, but under their approach there would be far greater intrusion into state criminal proceedings than is permitted under the ruling of the Court of Appeals.

Second, petitioners seek to *expand* the exception to the *Heck* prohibition against a civil rights lawsuit before the state criminal conviction is reversed to claims of selective enforcement of the laws. Not only has no federal court adopted this approach, but the argument itself calls into question the very rationale of the *Heck* decision.

B. Factual Background and Lower Court Proceedings

1. Gibson's Arrest and Racial Profiling in New Jersey

On October 28, 1992, respondent was arrested and charged with a drug offense on the New Jersey Turnpike following a stop and search motivated by racial considerations. A.95-98a. On April 21, 1994, respondent was convicted of the drug offense in the Superior Court of New Jersey. Respondent was a rear seat passenger in a car stopped by the petitioner state troopers. He did not own or control the car. The contraband was not on respondent's person or in his immediate control. *Id.* A.95-96a (¶ 45, 52, 54). The stop, detention and search were without probable cause and were the result of racial profiling practices. A.96a (¶ 52-55).

In *State v. Soto*, 324 N.J. Super. 66 (Law Div. 1996), based on an extensive record, the court ruled that the New Jersey State Police ("NJSP") endorsed a *de facto* policy of racial profiling on the southern end of the New Jersey Turnpike. 324 N.J. Super. at 84. After *Soto*, a State Attorney General investigation revealed that profiling practices were even more racially disparate than those disclosed in *Soto*, and that these practices were operative at the time of respondent's arrest and criminal proceedings.

In November, 1996, the Civil Rights Division of the United States Department of Justice ("DOJ") notified the State Attorney General of an investigation of NJSP racial profiling. A.91a. By April, 1999, the State Attorney General had obtained substantial data and other documentary evidence of unconstitutional racial profiling. Instead of releasing all of this information, including exculpatory

evidence relating to criminal proceedings, the Attorney General published the *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* (April 20, 1999) ("Interim Report"). The Interim Report deliberately understated the problem of racial profiling by the NJSP and avoided mention of significant aspects of the information known to the Attorney General regarding racial profiling. A.91-92a (¶ 30-36).

Additional racial profiling challenges in New Jersey criminal cases were brought in the wake of *Soto*. In response to this litigation, the Attorney General divulged more than 90,000 pages of discovery in November, 2000. These documents included exculpatory evidence regarding racial profiling practices that would call into question respondent's conviction.

Respondent first moved for post-conviction relief in October, 1999, based on the findings of *State v. Soto*, and the limited information contained in the Interim Report. The petition was denied on the ground that respondent had not presented sufficient evidence of racial profiling, *Brady* violations, or the illegality of his stop and arrest.

After the full release of the exculpatory materials in November, 2000, the Appellate Division of the Superior Court of New Jersey reversed respondent's conviction, holding that the evidence established a colorable basis to believe that respondent's stop, arrest and prosecution were the result of unlawful racial profiling. A.98a (¶ 63-65).

2. The Complaint and the District Court Rulings

In the district court, respondent alleged constitutional violations against petitioners Reilly and Pennypacker, who were the officers who detained, searched and arrested plaintiff on the New Jersey Turnpike on October 28, 1992. It was asserted *inter alia* that (1) the stop, detention, search, and arrest were unconstitutional in that they were part of a practice of racial profiling and selective enforcement of the laws in violation of the equal protection guarantees of the Fourteenth Amendment and (2) the stop, detention and search were without probable cause in violation of the Fourth Amendment.

The district court dismissed as time-barred the Fourth and Fourteenth Amendment claims. According to the district court, the tolling doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), was not applicable since none of these constitutional claims, if successful, would "necessarily imply the invalidity of [plaintiff's] conviction or sentence." *Id.* 512 U.S. at 486-87.

The Third Circuit reversed the dismissal of the Fourth Amendment claims in a 2-1 opinion. The majority opinion held that in determining the application of *Heck* to a §1983 Fourth Amendment claim which, if successful, would have required the suppression of evidence seized, the district court must conduct a fact-based inquiry to determine whether doctrines such as independent source, inevitable discovery, or harmless error would have remedied the introduction of the tainted evidence. The majority opinion held that respondent's Fourth Amendment claims were subject to the delayed-accrual rule because the claims, if successful, would have required suppression of the drugs

found at the time of his arrest, without which the criminal conviction could not stand. Judge Van Antwerpen dissented and would have held that respondent's Fourth Amendment claims were not subject to delayed accrual.

In a unanimous opinion, the court reversed the dismissal of respondent's Fourteenth Amendment selective enforcement and conspiracy claims.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Court of Appeals Properly Applied the *Heck v. Humphrey* Doctrine to the Fourth Amendment Claims and There is No Circuit Split that Requires Resolution by this Court

Petitioners assert that the Court of Appeals misconstrued the delayed accrual rule of *Heck v. Humphrey,* 512 U.S. 477 (1994), and that there is a division in the Circuit Courts on this issue that is deserving of review by this Court. Petitioners are wrong on both counts.

First, the decision of the Court of Appeals in this case was both faithful to the *Heck* decision, and in particular footnote 7, and this decision is in line with the overwhelming weight of authority in the courts of appeals. In ruling that the question of whether a determination in a civil rights case of a Fourth Amendment violation based on an illegal stop, detention, and search would necessarily imply the invalidity of a state criminal conviction, the Court of Appeals adopted the prevailing fact-based approach.

The Court of Appeals ruled that the *Heck* question cannot properly be answered on a hypothetical or per se

basis, and required analysis of the facts in the case – all of which of course are available from the public record after a conviction has been reversed or dismissed. In this case, the Court of Appeals properly ruled that the evidence secured by reason of the Fourth Amendment violations was the critical basis of the conviction and therefore a successful civil rights suit would imply the invalidity of the state conviction.

Petitioners acknowledge that six Circuits have adopted a fact-based inquiry in determining whether the *Heck* delayed accrual rule applies to Fourth Amendment claims challenging unlawful searches and seizures. In addition to the Third Circuit's holding in this case, the Second, Fourth, Fifth, Sixth, and Ninth Circuits have endorsed this approach. *Covington v. City of New York*, 171 F.3d 117, 121-24 (2d Cir.), *cert. denied*, 528 U.S. 946 (1999); *Ballenger v. Owens*, 352 F.3d 842, 845-47 (4th Cir. 2003); *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 395-99 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Harvey v. Waldron*, 210 F.3d 1008, 1015-16 (9th Cir. 2000).

Petitioners take the extreme position that accrual of claims like respondent's are "never delayed" under *Heck*, Petition at 4, and assert that decisions of the First, Eighth, Tenth, and Eleventh Circuits support this position. Petition at 10-11. Petitioners further contend that the Seventh Circuit has issued "conflicting decisions" on this issue. Petition at 11. Taken together, petitioners assert, these decisions create a "substantial circuit conflict." Petition at 9.

Review of the cases cited by petitioners shows that no Circuit has explicitly adopted this absolutist position.

Even if some of these cases can be fairly read to support petitioners' position, it is clear that, as stated by the court below, "the general trend among the Courts of Appeals has been to employ the fact-based approach" when applying the *Heck* delayed accrual rule. App. at 38a.

With respect to the Seventh Circuit, petitioners are incorrect in characterizing that court's decisions as "conflicting." In *Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998), the court did suggest that all Fourth Amendment claims accrued at the time of arrest and could go forward before invalidation of a conviction. However, in a later decision, the court explained that the *Copus* statements were dicta, and it employed a fact-based approach before determining that the plaintiff's Fourth Amendment claims accrued at the time his conviction was vacated. *Gauger v. Hendle*, 349 F.3d 354, 361-62 (7th Cir. 2003); *see also Wiley v. City of Chicago*, 361 F.3d 994, 997 (7th Cir.), *cert. denied*, 128 S. Ct. 68 (2004) (stating that "plaintiffs complaining of false arrest will sometimes have to wait until their criminal charge or conviction is set aside or dismissed before they can bring suit").

The court's later decision in *Kramer v. Village of North Fond du Lac*, 384 F.3d 856 (7th Cir. 2004), does not "conflict" with other precedents. There, the plaintiff argued that his Fourth Amendment claim did not imply the invalidity of his conviction and could go forward. Because the defendants did not challenge the plaintiff's contention, the court agreed, and, ultimately, denied the claim on the merits. *Id.* at 862, 866-67. *Kramer* did not rule that *all* Fourth Amendment claims accrue at the time of the arrest.

If there was any doubt about the Seventh Circuit's view on this issue, it was firmly resolved in *Ienco v. Angarone*, 429 F.3d 680 (7th Cir. 2005). In *Ienco*, the court, discussing its earlier ruling in *Gauger*, noted that it has "rejected a broad exception that a false arrest or other Fourth Amendment claims are *always* premature while the plaintiff still faces criminal punishment" and has "instead recognized that there are times when a successful challenge to a false arrest can indeed impinge upon the validity of an underlying conviction." *Id.* at 681 (emphasis supplied in original).[1]

In the Eighth Circuit, none of the cases cited by petitioners has specifically ruled that a blanket rule governs the accrual of a Fourth Amendment claim. Although the court has, in two cases, allowed claims to proceed without invalidation of a conviction, *see Whitmore v. Harrington*, 204 F.3d 784, 784-85 (8th Cir. 2000) (allowing Fourth Amendment unlawful stop claim to proceed); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (allowing *Fifth Amendment* coerced confession claim to proceed), in neither case did the court conduct any substantive analysis under *Heck*. Nor did the court conduct any such analysis in *Parker v. Matthews*, 71 Fed. Appx. 613 (8th Cir. 2003), the unpublished opinion cited as "eschew[ing] the fact-based approach." Petition at 12. Indeed, in *Parker*, the court did not even address the question of when the action accrued, but merely reversed the district court's order dismissing the complaint before

[1] Notably, in *Ienco*, the court rejected a position advanced by petitioners that there is a lack of clarity concerning the accrual of Fourth Amendment claims, and explained that its ruling followed directly from *Heck*. *Ienco*, 429 F.3d at 685.

service on the defendants on the ground that, at this very preliminary stage of the lawsuit, accepting the allegations in the complaint as true, the court could not say that the plaintiff's "false arrest claims are barred by *Heck*." *Id.* at 614.

On the other hand, in a case where the issue was directly presented, the Eighth Circuit followed the majority rule. Thus, in *Anderson v. Franklin County*, 192 F.3d 1125, 1131 (8th Cir. 1999), the court affirmed the district court's dismissal of a false arrest claim where the plaintiff had made no showing that his conviction or sentence had been rendered invalid. *Id.*

The Eleventh Circuit has followed a similar trend. In an early case, *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995), the court made the conclusory footnote statement, that a plaintiff's civil action was not barred by *Heck* in light of "such doctrines as inevitable discovery, independent source, and harmless error." This statement, however, was *dicta*, as it was irrelevant to the only question presented to the court for review: whether the district court was correct to dismiss the plaintiff's Fourth Amendment claim on *Rooker-Feldman* grounds. When the issue was central to a case, the Eleventh Circuit held that a district court erred in finding a plaintiff's search and seizure claims barred under *Heck* when the circumstances surrounding the plaintiff's convictions were unknown from the record. *Hughes v. Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003). In so doing, the court adopted the majority approach. Since, under *Heck*, because "*some* Fourth Amendment claims . . . if successful, necessarily imply the invalidity of the conviction," the court concluded that it must "look both to the claims raised under § 1983 and to

the specific offenses for which the § 1983 claimant was convicted." *Id.* at 1160 n.2 (emphasis supplied in original).[2]

The Tenth Circuit, though characterized by petitioners as having adopted a per se rule, has qualified its ruling suggesting that *Heck* does not delay accrual of Fourth Amendment claims. In the case cited by petitioners, the court stated the well-accepted general rule that "[c]laims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are *presumed* to have accrued when the actions actually occur." *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 (10th Cir. 1999) (quoting *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991)) (emphasis added). In *Beck*, the court found no "allegation or information indicating that we should not apply this presumption here" and concluded that the plaintiff's cause of action accrued at the time of his arrest. *Id.* Importantly, the court confirmed that it was not adopting a blanket rule and noted that it was not presented "with the rare situation . . . where all evidence was obtained as a result of an illegal arrest." *Id.* at 559 n.4.[3]

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[2] The Eleventh Circuit's more recent, unreported decision in *Wallace v. Smith*, 145 Fed. Appx. 300 (11th Cir. 2005), does not, as petitioners would have it, "reaffirm" prior Eleventh Circuit precedent. While the *Wallace* court did reverse a finding that a Fourth Amendment claim was barred by *Heck*, it did so upon citation to *Hughes*, 350 F.3d at 1160, a case where the court adopted the majority case-by-case approach. An internal conflict arising out of an unreported decision's incorrect analysis does not call for this Court's intervention.

[3] Whether such a situation is a "rarity" is open for debate. Regardless, as explained by the court below, these are exactly the circumstances presented in this case. App. at 43a (citing *Covington*, 171 F.3d at 123) (where the only evidence supporting the conviction is tainted by a possible constitutional violation that is the subject of a § 1983 action

(Continued on following page)

The First Circuit's position on the *Heck* delayed accrual rule is similarly qualified. In *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001), the court held that, for purposes of that case, claims "based on the officers' physical abuse or arrest of the [plaintiffs] accrued at the time that those events occurred." The court made clear, however, that it was dealing with the "mine-run" and acknowledged that "there may be rare and exotic circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." *Id.* at 52 n.4 (citing *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4-5 (1st Cir. 1995) (Lynch, J., concurring)).

There is no circuit split requiring review by this Court. The Seventh Circuit is firmly aligned with the majority approach. The Eighth and Eleventh Circuits have issued decisions that have not explicitly confronted the question of how the *Heck* rule applies to Fourth Amendment claims. But, when those courts have actually addressed the issue, they too have followed the majority approach. The First and Tenth Circuits have qualified their rulings and their cases do not address facts presented in this case, where the only evidence supporting a conviction was obtained through the unconstitutional search and there could be no reasons for not suppressing the evidence.

None of the other arguments offered by petitioners on the Fourth Amendment issue warrant a writ of certiorari. First, the assertion that the ruling of the Court of Appeals is in conflict with an opinion of an intermediate appellate

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the "quintessential example of when the *Heck* deferred accrual rule is triggered").

court of New Jersey is hardly consequential. The Supreme Court of New Jersey has not addressed this issue and when it does it may well agree with the Third Circuit. Moreover, different approaches to civil rights claims in state and federal court are often the result of federalism principles and the fact that courts differ in access or procedures that make one more or less plaintiff or defendant oriented on a specific issue is not unusual. *See, e.g., Johnson v. Frankell*, 520 U.S. 911 (1997) (state appellate rules govern on issue of interlocutory qualified immunity appeals in state courts).

Second, the argument that there should be clear and easily applied rules for application of statutes of limitations, ignores the fact that *Heck* itself creates deferral rules for statutes of limitation that inevitably will create some uncertainty. Moreover, there is no indication in the reported cases that the approach adopted by the court of appeals in this case has created problems for parties in this type of litigation.

Third, the claim that this Court's decisions in *Stone v. Powell*, 428 U.S. 465 (1976) and *Spencer v. Kemna*, 523 U.S. 1 (1998) render inoperative *Heck's* general prohibition against civil rights lawsuits where habeas corpus relief is not available was not made in the lower courts and is waived. Even if properly presented the argument that *Stone v. Powell* creates a wholesale exemption of Fourth Amendment claims from *Heck* is tied to the theory that *Heck* is premised solely on the need to prevent the use of §1983 as an alternative to habeas corpus actions. But *Heck* is not so limited and, if *Stone v. Powell*, which was decided

18 years before *Heck* had such an effect, this Court no doubt would have said so in the *Heck* opinion.[4]

The same is true for *Spencer v. Kemna*. For the first time in this litigation, petitioners argue that the concurring and dissenting opinions in *Spencer* provide support for their interpretation of *Heck*. But whatever issues are now open as a result of *Spencer* (and that case involved a plaintiff whose conviction in state court was still in place), this Court should resolve those issues in a case where they have been raised and decided in the lower courts.

The policy arguments made by petitioners demonstrate the significant weaknesses of their approach. Petitioners claim that the fact-based rule will lead to intrusions into state court and prosecutorial files. In fact, the opposite is more likely to be true and there is no evidence that the lower courts have had any difficulty in deciding these issues without intrusive discovery or other procedure.

Under the deferred accrual rule, there will be no civil rights action until (and unless) the state court criminal proceedings are resolved in the plaintiff's favor. In these cases, as is true in the case at bar, there will be *no* intrusion into the state proceedings and the federal courts will be able to determine whether the doctrines cited in *Heck's* footnote 7 would be relevant. By contrast, if petitioners' view were to prevail, *almost every* criminal defendant who

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[4] Petitioners also claim that *Nelson v. Campbell*, 541 U.S. 637 (2004) supports the argument for an "expansive" interpretation of footnote 7. But *Nelson* was decided on the theory that the claim (method of execution) sounded entirely in civil rights and had no habeas corpus implications.

believed that his Fourth Amendment rights were violated would have to file suit during the pendency of his criminal proceedings or even after conviction. This regime would surely be far more intrusive into state proceedings. Not only would the number of cases substantially increase, but discovery requests and other proceedings in the federal case would implicate police and prosecutorial files. Petitioners appear to reject the approach taken by some federal courts in staying the civil proceedings pending resolution of the criminal charges, Petition at 14, as one that both "delays and enhances uncertainty" or avoids the intent of *Heck's* footnote 7. But if petitioners are correct, the civil rights cases that they now demand be filed while state criminal proceedings are ongoing will either by highly intrusive (if not delayed by stays), or subject to the same kinds of delays that petitioners lament in their criticism of a fact-based approach.

The central point is that this Court need not ponder these points at this time since there is no indication that the fact-based approach has caused any of the problems that the petitioners' hypothesize.

B. The Court of Appeals Properly Ruled That The Delayed-Accrual Rule of *Heck* Applies to Claims of Racially Selective Law Enforcement Practices

The Court of Appeals unanimously ruled the claim that respondent was detained, arrested, searched and prosecuted in violation of the Equal Protection Clause of the Fourteenth Amendment would necessarily imply the invalidity of his conviction. Petitioners assert that certiorari should be granted on this issue to "clarify" the reach of footnote 7 of *Heck*. But no clarification is needed as no lower federal court has ruled contrary to the decision

below. Moreover, the reasons now asserted by petitioners for review in this Court were not argued below and are plainly tangential to the issue decided by the Third Circuit.

Petitioners seek to equate Fourth and Fourteenth Amendment claims, but the elements of a valid Equal Protection claim – that the criminal investigation and charges were motivated by racial animus – "necessarily imply the invalidity of [the] conviction or sentence," *Heck* at 486-87 (emphasis added), because proof of the violation requires dismissal of the charges. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Unlike Fourth Amendment claims, there can be no issues of harmless error, independent source, or inevitable discovery. Under the *Heck* doctrine, claims that are even indirectly inconsistent with a conviction, such as a *Brady* claim for suppression of exculpatory evidence, are tolled pending the criminal process. A successful *Brady* claim does not mean that the defendant cannot ultimately be convicted, but it does imply the invalidity of the conviction. Here, there is a direct contradiction of the conviction since a proven selective enforcement or selective prosecution claim mandates dismissal of the charges, and not merely a new trial.

In this case, the fact that the state criminal conviction was invalid as a result of selective enforcement of the laws could not be clearer. The specific grounds cited by the state courts in reversing plaintiff's conviction was proof of "racial profiling" by the New Jersey State Police. It cannot be that a civil rights claim based on equal protection principles arising from a state court determination reversing a criminal conviction because of selective enforcement of the laws does not by its very nature imply the invalidity

of the state criminal process and the conviction. As the court stated in *State v. Kennedy*, 247 N.J. Super. App. 21, 588 A.2d 834, 839 (1991), "It is morally incongruous for the state to flout constitutional protections and at the same time demand that its citizens obey the law." Indeed, under the rule proposed by petitioners, the validity of *Heck* itself would be called into question. If a racial selective prosecution claim did not imply the invalidity of the conviction, it is difficult to know which constitutional claims would fit this category.

In this Court, for the first time in this litigation, petitioners argue that because this Court has not definitively ruled whether the remedy for racially selective law enforcement measures should be suppression of evidence or dismissal of criminal charges, the Court should use this case as a vehicle to decide that issue and then, if suppression is the proper remedy, to extend petitioner's reading of footnote 7 to these claims. There are several compelling reasons for the Court not to go down this road in this case. First, as discussed, whatever this Court might say as to the appropriate remedy for Fourteenth Amendment selective enforcement claims, the New Jersey courts were clear that the remedy is dismissal of the charges. Under *Heck*, that is the end of the inquiry since plaintiff's claim undoubtedly would imply the invalidity of his conviction.

Second, none of the arguments now made by petitioners were made in the court below and therefore are waived. In the court of appeals, petitioners argued that the selective enforcement claim was limited to the stop of the car (and not to the detention, search and arrest of plaintiff). The Complaint makes clear, however, that the entire process was motivated by racial animus.

Third, the issue of what is the appropriate remedy for a selective enforcement claim should be decided in a case that directly presents that issue. Here, the issue was not argued in the lower courts and, given the rationale of *Heck* and the dispositive rulings of the New Jersey courts, the remedial issue is simply not presented.

Finally, even if this Court reached out to decide this issue in this case, and determined that suppression was the appropriate remedy, the result would be no different. The issue then would be whether there could be any grounds to deny suppression and in this case, no exceptions to a suppression remedy could be asserted under state or federal law.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiori should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly,

Petitioners,

v.

Emory E. Gibson, Jr.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' SUPPLEMENTAL BRIEF CALLING ATTENTION TO A NEW CASE PURSUANT TO RULE 15.8

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A NEW CIRCUIT COURT CASE NOT AVAILABLE AT THE TIME OF PETITIONERS' LAST FILING SUPPORTS THE NEED FOR REVIEW.

Last week's decision in *Wallace v. City of Chicago,* No. 04-3949 (7th Cir. March 8, 2006) (a copy of the slip opinion is appended to this brief) crystalizes the circuit split on the questions presented and highlights the recurrent nature of the problem and the need for resolution by this Court. The United States Court of Appeals for the Seventh Circuit held that "false arrest claims accrue at the time of arrest." *Id.*, slip op. at 2. The court considered several approaches to determining when false arrest and similar Fourth Amendment claims should accrue, *id.*, slip op. at 6, and concluded that the "clear rule" it adopted was best for policy reasons and most consistent with this Court's opinion in *Heck v. Humphrey*, 512 U.S. 477 (1994). *Wallace*, *supra*, slip op. at 6-11. The court noted the substantial circuit split concerning the accrual issue and observed that "[b]y aligning ourselves with one side of this debate, we do not break any new ground." *Id.*, slip op. at 13. The court advised "[i]ndividuals and attorneys who wish to preserve a claim for false arrest or similar Fourth Amendment violations [to] file their civil rights action at the time of arrest." *Id.*, slip op. at 10-11.

Because the decision overruled prior circuit precedent, the *Wallace* panel circulated the opinion among all judges of the court in regular active service, and a majority did not wish to hear the case en banc. *Id.*, slip op. at 2. Judge Posner, dissenting from the denial of the rehearing en banc, *id.*, slip op. at 15, would have adopted at most a rebuttable presumption that accrual occurs at the time of the arrest or alleged Fourth Amendment violation. *Id.*, slip op. at 18. The presumption would be rebutted "if, for example, the only evidence of [plaintiff's] guilt was evidence seized in a search that he challenges in his section 1983 suit." *Id.* Acknowledging that his rule would result in some "tough borderline cases," *id.*, slip op. at 19, and that existing circuit precedent is divided into

"two groups," *id.*, slip op. at 22, Judge Posner nevertheless concluded that most of the existing circuit precedent was "consistent," *id.*, and that the rebuttable presumption he proposed was superior for policy reasons and supported by *Heck*. *Id.*, slip op. at 20-23. Judge Posner criticized the court for "creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue." *Id.*, slip op. at 23.

Concerning the resolution of the questions presented, petitioners endorse the majority decision in *Wallace*, rather than Judge Posner's dissent, but agree with both Judge Posner and the majority that there is an intercircuit conflict on this recurrent issue. This petition affords this Court the opportunity to resolve this recurrent intercircuit conflict on an important issue of federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on both of the questions presented.

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Dated: March 16, 2006

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 04-3949

ANDRE WALLACE,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, KRISTEN KATO
and EUGENE ROY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 03 CV 2296—**Samuel Der-Yeghiayan,** *Judge.*

ARGUED MAY 31, 2005—DECIDED MARCH 8, 2006

Before EASTERBROOK, ROVNER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* From the age of fifteen until twenty-three, Andre Wallace was serving time in prison for his alleged participation in a murder. After several appeals, the Illinois Appellate Court found that the police had arrested him without probable cause and that his confession was not sufficiently attenuated from his unlawful arrest. At that point, the prosecution decided to leave well enough alone, and Wallace was released. Only then did Wallace commence the present action: he filed a suit under 42 U.S.C. § 1983 in federal court asserting that Detectives Kato and Roy and the City of Chicago had violated his Fourth Amendment rights and that they had

also committed the state torts of malicious prosecution and false imprisonment. The district court granted summary judgment in favor of all three defendants. We affirm. In doing so, we have found it necessary to clarify the law of our circuit concerning when a false arrest claim accrues. We reaffirm the holding of *Booker v. Ward*, 94 F.3d 1052, 1056-57 (7th Cir. 1996), that false arrest claims accrue at the time of arrest; to the extent that it is inconsistent with *Booker v. Ward* and the present opinion, we overrule *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003).

I

On January 17, 1994, John Handy was shot and killed at 825 N. Lawndale Avenue near the intersection of Chicago Avenue and Lawndale. Handy had been working as a house sitter for a construction company and had apparently had a previous confrontation with drug dealers in the area. Detectives Kristen Kato and Eugene Roy were assigned to investigate Handy's murder. After discussing the murder with witnesses and informants in the neighborhood, the police brought Wallace and Laron Jackson in for questioning on the night of January 19, 1994. At the time, the police were not aware that Wallace was only 15 years old because Wallace had told them he was 17 years old.

During the course of the night, Detectives Kato and Roy took turns interrogating Wallace. Wallace, they claim, was free to leave the station house at any time. Wallace's account is somewhat different: he reported that Kato

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Because this opinion would overrule an earlier decision of this court, in the manner described in Part II.A. below, it has been circulated among all judges of this court in regular active service. A majority did not wish to hear the case en banc. Circuit Judge Posner voted to hear the case en banc for the reasons stated in his dissent.

and Roy played "good cop/bad cop" with him to induce him to confess falsely. Kato was the bad guy; whenever Kato took a break, Roy spoke with Wallace and told him that if he confessed, Roy could get Kato to stop hurting him. This continued through the night. At about 4:15 a.m., the detectives confronted Wallace with Jackson's and another witness's statements that they saw Wallace running down the gangway from 825 N. Lawndale after hearing shots. Wallace then admitted that he was only 15. Around 6:00 a.m., Wallace agreed to confess. A youth officer and an assistant state's attorney met with Wallace and read him his *Miranda* rights and took his written statement. In his complaint, Wallace claims that Kato told him not to tell the state's attorney that Kato had promised Wallace that he could go home after he gave his statement.

Before his trial, Wallace filed several motions to suppress his statements on the grounds that his arrest had been made without probable cause and that the statements were coerced and violated his *Miranda* rights. His motions were all denied. On April 19, 1996, after a bench trial, Wallace was found guilty of first degree murder.

Wallace appealed. In an opinion issued on September 21, 1998, the Illinois Appellate Court found that the police arrested him without probable cause and remanded for a hearing to determine whether his statements were sufficiently attenuated from his unlawful arrest to permit their use. On remand, the circuit court found that Wallace's confession was sufficiently attenuated from his arrest and affirmed his conviction. Wallace appealed again, and the Illinois Appellate Court reversed the circuit court's decision and remanded for a new trial. On April 10, 2002, the prosecution filed a *nolle prosequi* motion and dropped the case.

On April 2, 2003, Wallace filed the present suit, asserting that his Fourth Amendment rights had been violated and

raising state law claims for false imprisonment and malicious prosecution. Kato and Roy filed an answer and a motion for summary judgment, and the City filed a motion to dismiss. On October 21, 2003, Wallace filed his response, just a week before we decided *Gauger v. Hendle*, which held that under the circumstances presented there the statute of limitations did not begin to run until the defendant's conviction was invalidated. 349 F.3d at 361-62.

On March 30, 2004, the district court granted summary judgment for Roy and Kato on all claims except Wallace's federal fair trial claim, which it denied without prejudice. The court also denied without prejudice the City's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Wallace filed an amended complaint on April 28, 2004, reasserting his Fourth Amendment claims. The defendants answered and filed a second motion for summary judgment, which included an affirmative defense of collateral estoppel. Wallace's response asserted that the defendants had waived their collateral estoppel defense by failing to raise it in their answer to his amended complaint. The defendants moved to amend their answer.

On October 29, 2004, the court granted the defendants' motion to amend their answer to assert their collateral estoppel defense and in the same order granted the defendants' motion for summary judgment. It concluded that Wallace had conceded that his false arrest claim was time-barred. Alternatively, the court held that even if Wallace was allowed to replead his claim under the more recent decision in *Gauger*, he would still be time-barred because Wallace could have brought the claim after the Illinois Appellate Court found on September 21, 1998, that Wallace was arrested without probable cause. This was so even though the appellate court remanded the case to the trial court to determine whether Wallace's confession was sufficiently attenuated from his illegal arrest. The district court concluded that at this point it was possible that even

if Wallace was illegally arrested his conviction could still stand, and thus he could not take advantage of the *Gauger* rule.

II

A. False Arrest Claim

Wallace brought his false arrest claim for violation of his Fourth Amendment rights under 42 U.S.C. § 1983. Before turning to the merits of the claim, we address briefly the government's argument that it is waived (or more properly, forfeited) because Wallace failed to raise it in a timely manner in the district court. Our review of the record shows that Wallace initially conceded that his false arrest claim was time-barred in the responsive papers he filed on October 21, 2003, under pre-*Gauger* law. After *Gauger* appeared a week later and before the district court ruled on the defendants' second motion for summary judgment, Wallace changed his position and asserted the merits of the false arrest claim. We therefore conclude that he neither waived nor forfeited this argument below.

Although federal law governs the question of the accrual of constitutional torts, state statutes of limitations and tolling doctrines apply once accrual has been determined. See *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989); see also *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998). Wallace's false arrest claim is subject to the two-year statute of limitations supplied by Illinois law under 735 ILCS § 5/13-202. In his case, that period was tolled until November 7, 1999, two years after Wallace turned eighteen years old, by virtue of 735 ILCS § 5/13-211. If Wallace's claim accrued as of April 10, 2002, when his conviction was finally nullified and the state dropped his case, then the suit filed on April 2, 2003, easily met the two-year deadline. If, on the other hand, his claim accrued at the time of his

arrest on January 20, 1994, his claim is time-barred, even taking into account the tolling that occurred during the period of his minority. Everything depends, therefore, on the accrual rule we must use.

In principle, there are at least three approaches we could take to the accrual of Fourth Amendment claims: (1) the Fourth Amendment claim arises at the time of the wrong (*i.e.*, the false arrest, the unlawful search); (2) the Fourth Amendment claim accrues only after the underlying conviction definitively has been set aside; or (3) as *Gauger* suggested, accrual depends on how central the evidence was to the conviction: if it was non-essential, use rule 1; if it was critical, use rule 2. Before settling on our preferred option, it is useful to review the underlying law in this area.

When a person's Fourth Amendment rights have been violated by a false arrest, the injury occurs at the time of the arrest. Thus, an individual is entitled to recover only for injuries suffered from the time of arrest until his arraignment. *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004) ("[W]e have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment."); see also *Gauger*, 349 F.3d at 363 ("[T]he interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects."). On the other hand, as Wallace's own case illustrates, it is often the case that the prosecution cannot proceed without the fruits of an unlawful arrest (as Wallace's confession was) or an unlawful search. In those cases, the idea that the claim accrues at the time of the injury runs into some tension with the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994).

In *Heck*, the Court held that a constitutional claim that would undermine a criminal conviction if vindicated cannot be brought until the defendant's conviction is nullified. *Id.* at 486-87. This general rule, which works perfectly well for complaints like the ones about the knowing destruction of

evidence and illegal identification procedure raised in *Heck*, has caused some courts—including this one in *Gauger*—to conclude that certain Fourth Amendment claims also do not accrue until after the defendant's conviction has been invalidated. See, *e.g.*, *Gauger*, 349 F.3d at 362; *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000) (holding that Fourth Amendment claims based on illegal search and seizure of evidence are not cognizable until the conviction is overturned or charges dismissed); *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999) (finding that generally false arrest claims accrue at the time of arrest, but that if success in the § 1983 case would "imply the invalidity of a conviction in a pending criminal prosecution," it does not accrue "so long as the potential for a judgment in the pending criminal prosecution continues to exist").

Heck itself instructs that a district court must:

> consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

512 U.S. at 487 (emphasis in original) (footnotes omitted). Footnote seven in *Heck* anticipates at least some Fourth Amendment cases. It suggests that despite the general rule of *Heck*, a suit for damages arising from an unreasonable search could go forward as a § 1983 claim without invalidating a criminal prosecution, because of the independent source or inevitable discovery doctrines. In *Gonzalez*, we saw two implications in the footnote: "(i) a claim based on an unlawful search or arrest may be brought immediately,

because a violation of the fourth amendment does not necessarily impugn the validity of a conviction—the evidence may be properly admitted anyway, or it may be excluded and the defendant convicted on other evidence—and (ii) a claim of damages based on the injury of being convicted is impermissible until the conviction has been overturned." 133 F.3d at 553 (internal quotation marks omitted).

In *Booker v. Ward,* we interpreted *Heck* to allow a false arrest claim to go forward before the defendant's conviction was invalidated:

> [A] wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably undermine a conviction; one can have a successful wrongful arrest claim and still have a perfectly valid conviction. Although in this case the Illinois Appellate Court's conclusion that Booker's confession was the inadmissible product of an unlawful arrest ultimately resulted in the dismissal of murder charges against Booker, in many cases, the prosecutor will have other witnesses or other evidence that will support a retrial.

94 F.3d at 1056 (citations omitted). The approach that the court took looked to the legal nature of the wrongful arrest claim, rather than to the specific facts of the case.

The *Gauger* opinion, in contrast, rejects an across-the-board approach to Fourth Amendment claims in favor of a case-by-case examination under which at least some false arrest claims would not accrue until after the conviction was invalidated:

> It might be argued that Gauger could have sued right after his arrest, even if he might also have waited until his criminal conviction was thrown out. But we do not think that such a conclusion would be consistent with *Heck*. For he could not knock out the arrest

> without also (by virtue of *Wong Sun* [*v. United States*, 371 U.S. 471 (1963)]) invalidating the use in evidence of his admissions, without which, as we have said, he could not be convicted. *Heck*, to repeat, says that a criminal defendant can't sue for damages for violation of his civil rights, if the ground of his suit is inconsistent with his conviction having been constitutional, until he gets the conviction thrown out.

349 F.3d at 362. See also *Wiley*, 361 F.3d at 997-98.

In our view, although it is conceivable that there are factual differences among Booker's, Gauger's, and Wallace's cases, the distinctions are unimportant in the end. In Gauger's case, the police suspected Gauger of murdering his parents. 349 F.3d at 356. They brought him in for questioning and Gauger made several incriminating statements that, according to his version of the interrogation, were stated as hypotheticals. *Id.* at 357. Gauger was convicted and sentenced to death. On appeal, the Illinois Appellate Court determined that his statements were inadmissable as the product of an unlawful arrest. *Id.* The court ordered a new trial, but the state never retried him and the charges were dropped after two members of the Outlaws motorcycle gang confessed killing Gauger's parents. *Id.* at 358. The resemblance to Wallace's case is plain.

It is true that in Booker's case, as in Wallace's, the state appellate court first remanded for an attenuation hearing before ordering a new trial. See *Booker v. Ward*, 94 F.3d at 1054. The result of the attenuation hearing was a conclusion that the confession was sufficiently attenuated from the defendant's unlawful arrest, but the Illinois Appellate Court reversed. *Id.* Just as in Wallace's case, at this point the prosecution filed a motion for a *nolle prosequi*, and the court dropped the charges against Booker. *Id.* It is telling that in both Booker's and Wallace's cases, the state appellate court formally decided that the defendant's

criminal prosecution could continue even though the arrests were unlawful. Only the pragmatic judgment of the prosecutors, which could have rested on a conclusion that it was unlikely that any additional evidence existed, or on a lack of resources for further investigation, or any of a number of other factors, caused the cases to end. The rule we articulated in *Booker v. Ward* recognizes that *ex ante* it is not readily apparent which criminal cases might proceed despite the consequences of the successful Fourth Amendment challenge. This, in our view, argues against a rule that requires judges several years after the event to decide whether a particular Fourth Amendment challenge would have been the death knell of the prosecution.

Even if a clear rule is what is needed, we still need to decide between options (1) and (2) above: that is, between a rule saying that all claims of this type accrue at the time of injury, and a rule that they all accrue only when the criminal conviction has been set aside. The footnote in *Heck* to which we referred earlier persuades us that the Supreme Court did not contemplate the second rule, as it took care to suggest that the statute of limitations should begin running on at least some claims at the time of the original injury. Although the Court refrained from holding that all Fourth Amendment claims accrue immediately, it had no need to reach that issue in *Heck*. We conclude that the approach taken by *Booker v. Ward*, while an arguable extension of *Heck*, is an extension that is justifiable in light of the policies behind both the statute of limitations and the need to avoid unnecessary interference with the outcomes of criminal proceedings.

To the extent, therefore, that *Gauger* eschews a clear rule for false arrest claims in favor of an evaluation of the evidence, we disapprove its approach and instead reaffirm our holding in *Booker v. Ward* that a "§ 1983 unlawful arrest claim . . . accrue[s] on the day of [ ] arrest." *Id.* at 1056-57. Individuals and attorneys who wish to preserve a

claim for false arrest or similar Fourth Amendment violations should file their civil rights action at the time of arrest. It will still be possible, of course, for a district court to stay any such action until the criminal proceedings are concluded, should it conclude in its discretion that a stay would be useful. We note as well that we are addressing only the question of accrual; other doctrines, such as equitable tolling, may also affect the time in which a particular suit may be brought. See *Heck*, 512 U.S. at 489 (reserving judgment on whether equitable tolling applies in this context).

One additional qualification is necessary, which in our view answers the concerns expressed in the dissent. *Heck* itself recognized that it is possible for a § 1983 claim based on false arrest or a similar Fourth Amendment violation "necessarily [to] imply the invalidity of [a plaintiff's] conviction or sentence," *Heck*, 512 U.S. at 486 n.6, 487 (example of plaintiff convicted of resisting arrest who challenges legality of arrest). The case to which the Court pointed, however, is one in which the fact of a Fourth Amendment violation is an element of the claim. In that relatively uncommon set of cases, there is an independent reason to insist that a plaintiff wait to sue until the criminal conviction has been set aside; if she does not, the possibility of inconsistent rulings on the validity of the arrest is too great. Our ruling addresses the normal run of cases, in which the Fourth Amendment violation affects only the evidence that might or might not be presented to the trier of fact. In those instances, we are convinced that a clear accrual rule is superior to a case-by-case approach.

As the parties have noted, the question of the proper rule for accrual is an issue that has divided our sister circuits. Although their reasoning varies, the Second, Fourth, Fifth, Sixth, and Ninth Circuits have held that false arrest claims that would undermine the defendant's

conviction cannot be brought until the conviction is nullified. See *Harvey*, 210 F.3d at 1015 (acknowledging circuit split and holding flatly that "a § 1983 action alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned"); *Covington*, 171 F.3d at 124; *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999) (explicitly rejecting suggestion that § 1983 illegal search claims accrue at the time of injury, since such a rule would "misdirect the criminal defendant" from focusing on "mounting a viable defense to the charges against him"); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998) (holding that success on false arrest claim would "necessarily imply" that conviction for disturbing the peace was invalid as not based on probable cause); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996) (*Heck* bars civil rights claims "when a § 1983 plaintiff's success on a claim that a warrantless arrest was not supported by probable cause necessarily would implicate the validity of the plaintiff's conviction or sentence"); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (stating that "a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest," but staying the civil action until the criminal prosecution was completed).

The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest. *Nieves v. McSweeney*, 241 F.3d 46, 52-53, 52 n.4 (1st Cir. 2001) (stating that "it is pellucid that all claims based on the officers' physical abuse or arrest of the appellants accrued at the time that those events occurred . . . because the appellants had ample reason to know of the injury then and there," and characterizing as "rare and exotic" the "circumstances in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the ar-

rest"); *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558, 559 n.4 (10th Cir. 1999) ("We generally disagree with the holdings in [*Covington* and *Mackey*] because they run counter to *Heck*'s explanation that use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction."); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998) (finding § 1983 false arrest claim not barred by *Heck*); *Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996) (finding § 1983 coerced confession claim not barred by *Heck*); *Datz v. Kilgore*, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (per curiam) (finding § 1983 illegal search claim not barred by *Heck*). By aligning ourselves with one side of this debate, we do not break any new ground.

B. False Confession Claim

Wallace also asserts a "false confession" claim that he claims is actionable under the Fourth Amendment, relying on the following language in *Gauger*:

> [Gauger's] incarceration resulted from the combination of a false arrest with (if his testimony is believed) a false account of his interrogation. If his testimony is believed, therefore, the seizure of his person was from the beginning to the end of his incarceration unreasonable, and shouldn't that bring the allegedly fraudulent account of his interrogation under the Fourth Amendment?

349 F.3d 360. In support of his claim, Wallace tries to distinguish a "continuing Fourth Amendment violation" from the "continuing seizure" theory discussed in Justice Ginsburg's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994). See *id.* at 279 (Ginsburg, J., concurring). His efforts are necessary, at least in this court, because we have already rejected a "continuing seizure" theory in the Fourth Amendment context. See *McCullah v. Gadert*,

344 F.3d 655, 661 (7th Cir. 2003) (citing *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996)). Nonetheless, we find them unavailing. Wallace tries to find some support for it in *Chavez v. Martinez*, 538 U.S. 760 (2003), but as we read that case it dealt only with the Fifth Amendment and the due process clauses. We reject the idea of a stand-alone "false confession" claim based on the Fourth Amendment, rather than the Fifth Amendment or the due process clauses.

C. Fourteenth Amendment Claim

Finally, Wallace tries characterizing his false confession claim as a violation of his Fourteenth Amendment right to a fair trial. Wallace contends that our decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), allows for a "false confession" claim as a due process violation. In *Newsome*, we affirmed the district court's decision to deny qualified immunity to two officers who had withheld exculpatory evidence from the defendant. *Id.* at 753. The reason was because, under *Brady v. Maryland*, 373 U.S. 83 (1963), officers who withhold such material violate a defendant's right to a fair trial. 256 F.3d at 752. See also *Ienco v. City of Chicago*, 286 F.3d 994, 999 (7th Cir. 2002) (allowing plaintiff to amend complaint to assert due process claim against police officers who withheld evidence); *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988) (allowing claim against officers who allegedly fabricated evidence and concealed exculpatory evidence to go forward).

As these brief summaries demonstrate, *Newsome*, *Ienco*, and similar cases do not stand for the proposition that there is a free-standing due process claim whenever unfair interrogation tactics (short of those that may shock the conscience and thereby implicate the Supreme Court's substantive due process rulings) are used to obtain a confession. Instead, they are grounded in tradi-

tional notions of what is required for a fair trial, including the *Brady* right to be given exculpatory material. In the end, all Wallace has is a complaint about the arrest and the subsequent confession, and that is the claim we have found to be time-barred. He cannot escape that result merely by re-characterizing the claim under a different part of the Constitution.

III

The City argued in the alternative that Wallace was not entitled to bring his suit under the *Heck* rule because the state court proceedings did not conclude in his favor. It reasons that the state *trial* court found that his confession was voluntary; that this finding was not disturbed as a matter of Illinois law when the state appellate court reversed and remanded the trial court's judgment; and that Wallace cannot prevail in his § 1983 action if this central fact is taken as established. Because we have resolved this appeal in favor of all three defendants on the statute of limitations ground, we decline to reach the City's alternative argument. It depends centrally on the intricacies of the law of collateral estoppel in Illinois, which is a topic on which all we could do in any event is to follow the Illinois courts to the best of our ability.

The judgment of the district court is AFFIRMED.

POSNER, *Circuit Judge*, dissenting from denial of rehearing en banc. The panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure

forbidden by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted? The panel holds that, except in the rare case in which a violation of the Fourth Amendment is an element of the crime with which the defendant is charged, it always accrues at the time of the arrest, search, or confession. Every other case to address the issue, including our own *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), holds that it *usually* accrues then, but not if the Fourth or Fifth Amendment claim, if valid, would upset the conviction. If it would, the claim does not accrue unless and until the conviction is vacated. In other words, a civil rights suit is not a permissible vehicle for a collateral attack on a conviction.

That is the holding of *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court said that the district court must "consider whether a judgment [in the civil rights suit] in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 486-87. The Court gave the following example of "a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful": "A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. . . . He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted. Regardless of the state law concern-

ing res judicata, . . . the § 1983 action will not lie." 512 U.S. at 486 n. 6 (emphasis in original). Faced with this flat statement, the panel carves the exception to its new rule that I mentioned in the first paragraph but does not give a reason for limiting the Court's exception to the particular illustration that the Court gave. The panel says only: "we are convinced that a clear accrual rule is superior to a case-by-case approach." It does not explain the source of its conviction.

Its accrual rule is not "clear," as I'll point out; it is also inconsistent with the principles of accrual. A suit cannot be filed—the claim on which it is based cannot have accrued—at a time when, because a condition precedent to suit has not been satisfied, the suit must be dismissed. The panel holds that the suit must be filed within the limitations period for section 1983 suits (usually two years) from the date of the arrest, search, or, as in this case, confession, even if at the end of the two years the plaintiff's conviction has not been vacated and even if the only evidence of his guilt presented at his criminal trial was the challenged evidence or confession. This is so, the panel holds, even though, to quote *Heck*, a judgment in the plaintiff's favor in the civil suit "would necessarily imply the invalidity of his conviction" because it would wipe out all of the evidence against him.

And if the plaintiff waits to sue until his conviction is vacated, he will not have the full statutory period within which to sue because he will be able to avoid dismissal only by appealing to the doctrine of equitable tolling. (That's assuming equitable tolling is available in *Heck* cases, a question the panel leaves open.) Equitable tolling permits a plaintiff to delay suing beyond the statutory limitations period if he is unable despite all due diligence to sue within the period; but as soon as he is able to sue he must. He is denied the benefit of the full statutory period. *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1213 (7th Cir.

1993); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990).

So the panel's decision puts the squeeze on these plaintiffs, contrary to normal principles of accrual, which do not force you—in fact do not allow you—to sue before you have a claim. If you have been convicted and success on your civil rights claim would undermine your conviction, you have no civil rights claim unless and until you get the conviction set aside. If the search turned up no evidence, or the confession was excluded at the criminal trial, or the other evidence of guilt was overwhelming, the claim does not challenge the conviction and so it accrues at the time of the search. But that is not every case.

The proper response is to adopt a presumption against the unlikely result. (The panel does not discuss that alternative.) The presumption would be that even if the plaintiff's Fourth or Fifth Amendment defense had prevailed in the criminal proceeding against him, he still would have been convicted, either because the violation had not produced evidence used against him in that proceeding or because, though it had, there was plenty of other evidence to convict him. The presumption would be rebutted if, for example, the only evidence of his guilt was evidence seized in a search that he challenges in his section 1983 suit. This is not a hypothetical case; it is our twin *Okoro* cases, *Okoro v. Bohman*, 164 F.3d 1059, 1061 (7th Cir. 1999), and *Okoro v. Callaghan*, 324 F.3d 488 (7th Cir. 2003). The plaintiff, who had been convicted of a drug offense on the basis of heroin found during a search of his home, brought a federal civil rights suit in which he claimed that he had offered to sell the police jewels (which he claimed they stole from him in response to his offer), not drugs. His conviction was never reversed or otherwise nullified. We held the suit barred by *Heck* because if he was believed he should not have been convicted, since the heroin was essential to the conviction; and so his Fourth Amendment suit for the allegedly stolen

jewelry was barred. *Hudson v. Hughes*, 98 F.3d 868, 872 (5th Cir. 1996), is a similar case with the same result.

Another clear case is *Gauger* itself. His conviction, we pointed out, "rested crucially on the statements that he made to the police when he was questioned after being arrested. Earlier we said that he might well have been prosecuted even if his version of the interrogation had been accepted, because his version was incriminating though not as much so as the prosecutors' version. With no statement at all in evidence, however, he could not have been convicted of guilt of his parents' murder beyond a reasonable doubt; the other evidence—the lack of forced entry or signs of struggle, for example—was probative merely as corroboration of his statements construed as a confession or at least as damaging admissions. So when he showed that the statements were the product of a false arrest and hence were inadmissible at his criminal trial, he successfully impugned the validity of his conviction, as the state implicitly conceded when it dropped the charges against him following the reversal of his conviction." 349 F.3d at 361-62.

There will be tough borderline cases, but the tough cases are not resolved by the decision today. They will simply be fought out as equitable-tolling cases rather than accrual cases—if equitable tolling is available, a question on which the panel, as I noted, reserves judgment: so much for the panel's having adopted a "clear rule." If equitable tolling is unavailable, then Fourth and Fifth Amendment claimants will automatically file within the statutory period dated from the search—and then plead with the district court to disobey *Heck* and not dismiss the suit, even if it is not yet ripe because the conviction has not been set aside and its validity depends on the validity of the search. As the Sixth Circuit sensibly observed in *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 399 (6th Cir. 1999), "just as a convicted prisoner must first seek relief through habeas

corpus before his § 1983 action can accrue, so too should the defendant in a criminal proceeding focus on his primary mode of relief—mounting a viable defense to the charges against him—before turning to a civil claim under § 1983." The panel does not discuss that observation.

The panel denies that it is creating an intercircuit conflict. It says that there is already a conflict and it is just taking sides. Citing five cases, the panel states flatfootedly: "The First, Third, Eighth, Tenth, and Eleventh Circuits have held that false arrest claims accrue at the time of the arrest . . . . By aligning ourselves with one side of this debate, we do not break any new ground." That is incorrect. None of those cases hold that such claims *always* accrue at the time of arrest. All they hold is that *normally* a Fourth Amendment claim accrues them. Not one of them even *says* (as distinct from holds) that it always does, and two of the five explicitly allow for later accrual in exceptional cases.

The five cases are *Nieves v. Sweeney*, 241 F.3d 46, 52-53 (1st Cir. 2001); *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 558 (10th Cir. 1999); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998); *Simmons v. O'Brien*, 77 F.3d 1093, 1097 (8th Cir. 1996), and *Datz v. Kilgore*, 51 F.3d 252, 253 n. 1 (11th Cir. 1995) (per curiam). *Nieves* acknowledges that there may be cases "in which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." 241 F.3d at 52 n. 4. Even the passage that the panel quotes from *Nieves* acknowledges that a section 1983 claim does not always accrue at the time of arrest. *Id.* *Beck* also acknowledges such a possibility. 195 F.3d at 558-59. In *Montgomery*, the plaintiff's claims, which were for false arrest and false imprisonment, were unrelated to the outcome of the criminal prosecution against her. Her "claim for false arrest . . . covers damages only for the time of detention until the issuance of process or arraignment, and not more. In addition, Montgomery's section 1983 false imprisonment claim relates only to her arrest and the

few hours she was detained immediately following her arrest. Montgomery therefore reasonably knew of the injuries that form the basis of these 1983 claims on the night of her arrest." 159 F.3d at 126 (citations omitted).

In *Datz*, a search case, the court held that the plaintiff did not have to wait until the outcome of his criminal case to bring his civil case because it was uncertain whether a ruling in the civil case that Datz's search had been illegal would be inconsistent with his criminal conviction, for "even if the pertinent search did violate the Federal Constitution, Datz' conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." 51 F.3d at 253 n. 1. Since Datz was convicted of being a felon in possession of a firearm, and the firearm was found in the search, it might seem that his conviction could not coexist with invalidating the search. But as the state court that upheld his conviction noted, "ammunition for the weapon also was found in two locations in appellant's house. The police evidence custodian testified appellant contacted him numerous times, by phone and in person, seeking return of 'his AR-15 rifle.'" *Datz v. State*, 436 S.E.2d 506, 509 (Ga. App. 1993). If there is untainted evidence here, the panel's result might well be correct, but there is no discussion of the other evidence in its opinion. In *Simmons* the only issue discussed is whether admission of a coerced confession can be a harmless error; as far as appears, no issue was made of whether the admission of the confession had been harmless. 77 F.3d at 1094-95. The panel does not discuss *Montgomery*, *Datz*, or *Simmons*; its characterization of them (e.g., "finding § 1983 coerced confession claim not barred by *Heck*") is consistent with the principle that the claim *usually* accrues later.

The cases that the panel acknowledges are in conflict with its accrual rule are, besides *Gauger*, *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *Shamaeizadeh v. Cunigan*,

supra, 182 F.3d at 399; *Covington v. City of New York*, 171 F.3d 117, 124 (2d Cir. 1999); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996), and *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995). The list is incomplete. Mysteriously omitted, without comment, are *Uboh v. Reno*, 141 F.3d 1000, 1006-08 (11th Cir. 1998), and *Woods v. Candela*, 47 F.3d 545, 546 (2d Cir. 1995) (per curiam). *Nieves*, at least, must be added to the list along with *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st Cir. 1995), cited in *Nieves*, as well as our decision in *Booker v. Ward*, 94 F.3d 1054, 1056 (7th Cir. 1996), where we said, examining the proceedings in the Illinois courts, "that success on Booker's unlawful arrest claim would not necessarily undermine the validity of his conviction." That's the test, all right. And note that *Beck*, one of the cases the panel cites for its rule, expressly declined to reject *Covington*. 195 F.3d at 559 n. 4.

The panel may have been misled by the reference in *Harvey v. Waldron*, *supra*, 210 F.3d at 1015, to "a split in the circuits." The court in *Harvey* mischaracterizes the approach of courts (including itself!) that reject the approach taken by the panel today. It describes them as holding that a Fourth or Fifth Amendment claim *never* accrues until and unless the conviction is vacated. Those courts hold only that such a claim *sometimes* doesn't accrue until then, for example if there is no other evidence to support the conviction besides evidence claimed to have been obtained illegally. So in *Harvey* the court went on to satisfy itself that the evidence alleged to have been illegally seized was essential to Harvey's conviction. *Id.* at 1015-16.

The panel is right that there are two groups of cases. But they are consistent. One holds that a Fourth or Fifth Amendment claim accrues at the time of arrest, assuming the conviction does not depend on the evidence alleged to

have been illegally seized. The other holds that the claim does not accrue then if the conviction does depend on that evidence.

I count 12 cases to 0 against the panel's approach, with the other three cases (*Montgomery*, *Simmons*, and *Datz*) noncommittal but consistent with the 12. So one-sided a score should give us pause. If there is a compelling practical reason for flouting conventional statute of limitations principles, forging a lonely path, and creating more work for the Supreme Court, which now faces an intercircuit conflict on a recurrent issue, the panel has not explained what it might be.

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Clerk of the United States Court of Appeals for the Seventh Circuit

(3)

No. 05-779

In the
Supreme Court of the United States

Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly,

Petitioners,

v.

Emory E. Gibson, Jr.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A. The Issue of the Appropriate Remedy for Selective Enforcement Was Litigated Below and Is Properly Before the Court.

Respondent, in his opposing brief in No. 05-779, contends that "the issue of what is the appropriate remedy for a selective enforcement claim . . . was not argued in the lower courts." Brief in Opp., p. 17. This contention is baseless because the appropriate remedy for selective enforcement is an indispensable element of the application of the delayed-accrual rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), to a § 1983 claim of selective enforcement, and this issue was argued and litigated from the very inception of this case. To the extent the argument over remedy may have been abbreviated, the abbreviation occurred because, in the district court, respondent agreed with petitioners that the appropriate remedy is suppression. Not until his appeal did respondent change his position and argue that dismissal of the charges, rather than suppression, would have been appropriate.

In the district court, in supporting their contention that *Heck* did not delay the accrual of respondent's selective-enforcement claim, petitioners argued that respondent's § 1983 claim alleging selective enforcement, if successful, "would imply only the illegality of the arrest and search and seizure and the consequent taint of seized evidence intended for use in the criminal trial." *Brief in Support of Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6)*, dated April 16, 2003, filed July 15, 2003,[1] pp. 10-11. Respondent disagreed with petitioners' construction of *Heck* but acknowledged that his "selective enforcement claims would have required suppression of evidence." *Plaintiff's Brief and Appendix in*

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[1] At this time in 2003, the motion practice of the United States District Court for the District of New Jersey required parties to exchange opposing motion papers and then to file all papers simultaneously. Thus, the signature date appearing upon papers often preceded the filing date.

Opposition to Motion to Dismiss, dated June 20, 2003, filed July 15, 2003, p. 25. Respondent discussed, quoted from, and relied upon state-court caselaw to support "the appropriateness of the suppression remedy in profiling claims." *Ibid.* The district court agreed with the parties that the claim of selective enforcement, if successful, would have warranted only the suppression of the seized evidence. (Petition App., 65a-66a).

In the circuit court, however, respondent contended that "the remedy for selective enforcement or selective prosecution is *dismissal* of the criminal charges." *Brief of Appellant Emory E. Gibson, Jr.*, filed June 14, 2004, p. 19 (emphasis in the original). Respondent cited to and quoted from caselaw in support of this contention. *Id.* at 18-20. Petitioners disagreed and argued that the district court was correct. *Brief on Behalf of Appellees Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly*, filed September 13, 2004, pp. 26, 31-32.[2] Although the court below accepted respondent's position, respondent errs to contend that it did so without argument.

Respondent contends that "the New Jersey courts were clear that the remedy is dismissal of the charges." Brief in Opp., p. 14. On the contrary, the New Jersey courts are clear that "[o]nce it has been established that selective enforcement has occurred" the fruits thereof "will be suppressed." *State v.*

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[2] Respondent asserts that "[i]n the court of appeals, petitioners argued that the selective enforcement claim was limited to the stop of the car (and not to the detention, search and arrest of plaintiff)." Brief in Opp., p. 16. To the contrary, petitioners argued that "the only charge that would have been subject to dismissal if a court had found that the Trooper Defendants selectively enforced the traffic laws would have been any motor-vehicle related charges which had been issued to [Gibson]," *Brief on Behalf of Appellees Peter Verniero, Ronald Susswein, John Fahy, George Rover, J.W. Pennypacker, and Sean Reilly*, filed September 13, 2004, p. 31, but agreed that suppression may have occurred on the drug charges.

Segars, 172 N.J. 481, 492-93, 799 A.2d 541, 548-49 (2002).[3] Suppression would have been the remedy at respondent's retrial if selective enforcement had been established and if the State had chosen to re-try the matter. Dismissal in respondent's case occurred because "in the interests of justice" the State forewent the opportunity to "litigat[e] the issue of selective enforcement" and moved to "dismiss the indictment[] with prejudice." Petition App., 110a; 111a-112a.

Respondent argues that "no clarification is needed" on the "reach of footnote 7 of *Heck*" as applied to a claim of selective enforcement because "no lower federal court has ruled contrary to the decision below." Brief in Opp., pp. 14-15. Clarification is needed because lower federal courts are unanimous that *Heck*'s footnote seven pertains not only to Fourth Amendment claims of unlawful seizure but also to similar claims that would, if successful, result in the suppression of evidence at the criminal trial rather than outright dismissal of the criminal charges. Petition, pp. 9-10. And federal and state courts have ruled that the remedy for selective enforcement is suppression, rather than dismissal. Petition, pp. 21-22. Clarification is needed on the reach of footnote seven of *Heck* as applied not only to Fourth Amendment claims but also to claims of selective enforcement.

Respondent argues that "the issue of what is the appropriate remedy for a selective enforcement claim should be decided in a case that directly presents that issue." Brief in Opp., p. 12. Respondent's view that this case does not "directly" present the issue is tantamount to his claim that *Heck*'s footnote seven requires a fact-based inquiry. Because the petition properly raises the propriety of that claim, the

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[3] Respondent appears to argue that *State v. Kennedy*, 247 N.J. Super. 21, 588 A.2d 834 (App. Div. 1991), supports his claim that state law requires dismissal. Brief in Opp., p. 16. In *Kennedy*, the court held the remedy to be suppression, rather than dismissal. 247 N.J. Super. at 30, 588 A.2d at 838-39.

second question presented fairly includes and directly presents the subsidiary issue of remedy.

B. Whether Delayed Accrual Applies to Claims That Are Not Cognizable in Habeas Corpus Is Fairly Included in the First Question Presented and Is Properly Before the Court.

Respondent argues that petitioners have "waived" the argument that delayed accrual does not apply to claims that are not cognizable in habeas corpus because it "was not made in the lower courts." Brief in Opp., p. 12. The dissenting judge in the court below advanced this argument to support his opinion that the Fourth Amendment claims were not subject to delayed accrual. Petition App., 16a-17a. No judge in the court below suggested that this argument was waived. This argument is fairly included in the first question presented in that the argument, if valid, would answer this question in the negative, whereas a positive answer to the first question presented must reject this argument.

The first question presented was vigorously litigated in the district and circuit courts, and no claim of "waiver" has been or could be made as to this question. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n. 2 (2000). This principle is particularly applicable when the circuit court "understood the tenor of the argument." *Ibid.*

Respondent complains that "[f]or the first time in this litigation, petitioners argue that the concurring and dissenting opinions in *Spencer* [*v. Kemna*, 523 U.S. 1 (1998)] provide support for their interpretation of *Heck*." Brief in Opp., p. 13. Although *Spencer* arguably supports petitioners' interpretation of *Heck*, petitioners did not cite *Spencer* for that reason. Petitioners cited *Spencer* to support their argument that the first question presented merits review. Petition, p. 17. The

concurring and dissenting opinions in *Spencer*, which suggest that *Heck* does not apply to claims not cognizable in habeas corpus, have caused circuit courts to question whether *Heck* applies to these claims. *Ibid.* The first question presented provides this Court with the opportunity to settle the matter.

C. The Circuit Split Is Substantial and Warrants Review.

The Seventh Circuit's decision in *Ienco v. Angarone*, 429 F.3d 680 (2005), did not "firmly resolve" that Circuit's view of *Heck*'s footnote seven. Brief in Opp., p. 8. Rather, *Ienco* demonstrates the Seventh Circuit's confusion and vacillation. In an earlier appeal in the same case, the court stated that Ienco's Fourth Amendment claims were time-barred because they "expired two years after his arrest." *Ienco v. City of Chicago*, 286 F.3d 994, 1000-01 (7th Cir. 2002). In *Ienco v. Angarone*, the court referred to its earlier ruling as erroneous "dicta." 429 F.3d at 684. The reference to "dicta" was itself dicta because the court refused to allow Ienco to resurrect his Fourth Amendment claims, having concluded that Ienco abandoned them. *Id.* at 684-85.[4] The conflicting *Ienco* decisions highlight that circuit's confusion about *Heck*'s footnote seven.

The Eighth Circuit's decision in *Anderson v. Franklin County*, 192 F.3d 1125 (1999), did not follow what respondent refers to as the "majority rule." Brief in Opp., p. 8. The plaintiff's Fourth Amendment claims did not include unlawful search, *id.* at 1128, and the decision made no fact-based analysis of what, if anything, was uncovered by a search. The plaintiff's Fourth Amendment claims of false arrest and

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[4] In response to Ienco's assertion that he did not voluntarily abandon these claims but instead relied upon extant Seventh Circuit precedent holding them to be time-barred, the court did not "reject [the] position . . . that there [was] a lack of clarity concerning the accrual." Brief in Opp., p. 8 n. 1. Rather, the court responded that Ienco could have anticipated this construction of *Heck*. 429 F.3d at 684.

imprisonment and excessive force were advanced with his contention that "he was coerced into pleading guilty." *Id.* at 1131. The court appears to have affirmed the district court's application of the *Heck* delayed-accrual rule to dismiss these claims because this contention would necessarily have implied the invalidity of the plaintiff's conviction. *Ibid.* In any event, there was no analysis of tainted evidence and no adoption of the "majority rule."

That the Tenth Circuit in *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553 (1999), noted that it was not "faced with the rare situation . . . where all evidence was obtained as a result of an illegal arrest" does not mean that it would in this situation abandon its construction of footnote seven. The court reaffirmed its view that "nothing in *Heck* changes the general rule that causes of action relating to an allegedly illegal arrest arise at the time of the arrest," 195 F.3d at 558, and its "disagree[ment] with . . . cases" that hold that delayed accrual "depends on whether evidence obtained as a product of the arrest is used at trial." *Id.* at 559 n. 4. The *Beck* court's agreement that accrual for a claim of illegal arrest is *sometimes* delayed hinged upon special circumstances such as those described in *Heck*'s footnote six, 195 F.3d at 558-59, *e.g.*, those in which a plaintiff convicted of resisting a lawful arrest seeks to bring a § 1983 cause of action claiming that the arrest was unlawful. *Heck*, 512 U.S. at 487 n. 6.

The Eleventh Circuit's decision in *Hughes v. Lott*, 350 F.3d 1157 (2003), did not adopt what respondent refers to as "the majority approach." Brief in Opp., p. 9. Rather, the court held that "*Heck* does not *generally* bar [Fourth Amendment] claims." 350 F.3d at 1160 (emphasis added). Like the Tenth Circuit in *Beck*, the *Hughes* court clarified its use of the adverb "generally" by reference to *Heck*'s footnote six. 350 F.3d at 1160 n. 2. In reinstating the search and seizure claim and holding that it was "impossible" to determine from the existing record whether the delayed-accrual rule should apply, 350 F.3d at 1161, the court neither ordered nor suggested the fact-based inquiry that the majority opinion below endorses.

Nor did the First Circuit so suggest in *Nieves v. McSweeney*, 241 F.3d 46, 52 n. 4 (2001), when it referred to "rare and exotic circumstances in which a § 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." The *Nieves* court is at odds with the majority opinion below.

Even if, as respondent argues, "the trend in the Circuits is . . . in [the] direction" of the majority opinion below, Brief in Opp., p. 1, the matter warrants review because no Circuit opinion has taken into account this Court's expansive interpretation of *Heck*'s footnote seven in *Nelson v. Campbell*, 541 U.S. 637, 647 (2004). See Petition, p. 15. Respondent argues that *Nelson* is irrelevant because it did not deal with delayed accrual. Brief in Opp., p. 13 n. 4. But the issue before the *Nelson* court - the distinction between habeas claims and § 1983 claims - informed the *Heck* opinion, *see* 512 U.S. at 480-81, and this Court's construction of footnote seven of *Heck* in its *Nelson* decision in turn informed this Court's resolution of *Nelson*.

D. Policy Considerations Advanced by Respondent Do Not Diminish the Need for Review.

That "different approaches to civil rights claims in state and federal court are often the result of federalism principles and the fact that courts differ in access or procedures," Brief in Opp., p. 12, is not a reason to tolerate the conflict between federal and state courts in New Jersey about the proper construction of *Heck*'s footnote seven. The question of when a federal claim for relief accrues is a question of federal law. *Rawlings v. Ray*, 312 U.S. 96 (1941); *Cope v. Anderson*, 331 U.S. 461 (1947). The answer to that question should be the same in state and federal courts. Plaintiffs should not be given the incentive to forum-shop for the court, federal or state, that will allow their claims to proceed.

Respondent endorses toleration of the uncertainty about accrual effected by the majority opinion below because "*Heck* itself creates deferral rules for statutes of limitations that

inevitably will create some uncertainty." Brief in Opp., p. 12. The uncertainty is not "inevitable" and arises from the majority opinion's erroneous construction of *Heck*'s footnote seven.

Respondent asserts that "there will be no civil rights action until (and unless) the state court criminal proceedings are resolved in the plaintiff's favor." Brief in Opp., p. 13. The uncertainty about the date of accrual unwisely encourages plaintiffs to file early, prophylactic complaints to avoid expiration of the statute of limitations. Regardless of how *Heck*'s footnote seven is construed, many of those complaints will present Fourth Amendment causes of action that have accrued although the state court criminal proceedings have not been resolved in plaintiff's favor.

Respondent asserts that under petitioners' approach "there would be far greater intrusion into state criminal proceedings than is permitted under the ruling" below. Brief in Opp., p. 1; *see also id.* at 13-14. The need to make a fact-based analysis of the criminal trial to determine the applicability of doctrines such as independent source, inevitable discovery, and especially harmless error - with an evaluation of the strength of the prosecutor's case - imposes a layer of intrusion above and beyond that imposed by the civil rights action itself.

Respondent states that "[p]etitioners appear to reject the approach taken by some federal courts in staying civil proceedings pending resolution of the criminal charges." Brief in Opp., p. 14. Petitioners endorse stays in appropriate cases but understand that stays must be premised upon abstention doctrines or bases other than *Heck*'s delayed-accrual rule. Doctrines other than delayed accrual appropriately address federal interference in pending criminal prosecutions. *E.g.*, *Heck*, 512 U.S. at 487 n. 8.

Respondent argues that "there is no indication that the fact-based approach has caused any of the problems that the petitioners' [*sic*] hypothesize." Brief in Opp., p. 14. Indication of problems in construing *Heck*'s footnote seven appears in

circuit courts' conflicting opinions and their efforts to grapple with its meaning. Indication of uncertainty in its application appears in the caselaw, including *Ienco v. Angarone*, 429 F.3d 680, 684 (7th Cir. 2005), upon which respondent relies. See discussion, *supra*, p. 5. Indication of problems is evident in caselaw requiring an automatic stay pending resolution of criminal charges in circuits that have adopted the approach of the majority opinion below. Petition, pp. 13-14.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on both of the questions presented.

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